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EDITOR'S NOTE

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No. 86-5344-CSY
Status: GRANTED

Title: James Ernest Miller, Petitioner
v.
Florida

Docketed:
August 22, 1986

Court: Supreme Court of Florida

Counsel for petitioner: Barnard, Craig S.

See also:
85-7216

Counsel for respondent: Shearer, Joy B.

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 25 1986		DISTRIBUTED. October 10, 1986
4	Oct 7 1986	P	Response requested.
5	Oct 22 1986		Brief of respondent Florida in opposition filed.
6	Oct 30 1986		REDISTRIBUTED. November 14, 1986
8	Nov 17 1986		Petition GRANTED.
			**********
9	Dec 15 1986		Joint appendix filed.
11	Dec 15 1986		Order extending time to file brief of petitioner on the merits until January 13, 1987.
12	Jan 13 1987	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
13	Jan 13 1987		Brief of petitioner James Ernest Miller filed.
14	Jan 27 1987		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
15	Feb 12 1987		Brief of respondent Florida filed.
16	Feb 19 1987		Record filed.
17	Mar 13 1987		CIRCULATED.
18	Mar 11 1987		SET FOR ARGUMENT. Tuesday, April 21, 1987. (2nd case).
19	Apr 7 1987	X	Reply brief of petitioner James Ernest Miller filed.
20	Apr 21 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

NO. _____

86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

ANTHONY CALVELLO
Assistant Public Defender

GARY CALDWELL
Assistant Public Defender

Attorneys for Petitioner

QUESTION PRESENTED

WHERE THE FLORIDA LEGISLATURE AND SUPREME COURT AMENDED FLORIDA'S SENTENCING GUIDELINES LAW AFTER PETITIONER COMMITTED A SEXUAL OFFENSE, AND WHERE ONE PURPOSE OF THE AMENDMENT WAS TO INCREASE SENTENCES FOR SEXUAL OFFENDERS, DID THE STATE TRIAL COURT VIOLATE THE EX POST FACTO CLAUSE BY INCREASING PETITIONER'S SENTENCE BY USE OF THE AMENDED GUIDELINES?

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AUTHORITIES CITED

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, James Ernest Miller, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed May 8, 1986, and states:

CITATIONS TO OPINIONS BELOW

The decision of the Florida Supreme Court in this cause appears as State v. Miller, 488 So.2d 820 (Fla. 1986) and is set out at page 1 of the appendix to this petition. The decision of the district court of appeal is reported as Miller v. State, 468 So.2d 1018 (Fla. Dist. Ct. App. 1985) and is set out at appendix pages 2-3.

JURISDICTION

The Florida Supreme Court entered its opinion on May 8, 1986, and denied rehearing on June 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted in the state courts below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW

This case involves Article I, Section 10 of the Constitution of the United States which provides in pertinent part that "No State shall ... pass any ... ex post facto Law." It also involves section 921.001, Florida Statutes (1983) and Rules 3.701

and 3.988, Florida Rules of Criminal Procedure, both in their original form, and as amended which, because of their length are set out at pages 4-46 of the appendix to this petition.

STATEMENT

On August 25, 1984, Mr. Miller committed the following crimes in the State of Florida: sexual battery with slight force, burglary with assault, and petty theft. Mr. Miller was convicted of these offenses after trial by jury. Since the crime occurred after October 1, 1983, it was mandatory that the trial court sentence Mr. Miller in accord with Florida's sentencing guideline statute. Section 921.001(4), Florida Statutes (1983). The guidelines scheme divides the Florida criminal code into nine categories. One of the categories is for "Sexual Offenses," which included the sexual battery offense of which Mr. Miller was convicted. Under the guidelines the defendant receives points for the severity of the offenses committed, the severity of his prior record, his legal status at the time of the offenses (whether he was on probation, parole, or had other legal restraints on his liberty), and the extent of victim injury, if any. The recommended guideline sentence depends upon the number of points which the defendant has received. The trial judge is required to sentence the defendant within the recommended guidelines range absent "clear and convincing" grounds for departure. Rule 3.701.d.11, Florida Rules of Criminal Procedure. The facts supporting a departure must be proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986). Persons sentenced under the guidelines are not eligible for parole. In sentencing petitioner, the trial court made no finding that there were clear and convincing reasons for a departure.

Under the guidelines in effect at the time of the crimes in question, the recommended guidelines sentence for Mr. Miller would have been between 3-1/2 and 4-1/2 years' imprisonment, with a recommended sentence of four years' imprisonment.

On May 8, 1984, the Florida Supreme Court approved amendments to the sentencing guidelines. The Florida Bar: Amendment to Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984). One

of the principle purposes of the amendments was to increase "rates and lengths of incarceration for sexual offenders." 451 So.2d at 824, n. The legislature approved the amendments, which then went into effect on July 1, 1984.

Mr. Miller's case came up for sentencing on October 2, 1984. Over defense counsel's objection, the trial court judge employed the new sentencing guidelines, which called for a sentence of between 5-1/2 and 7 years of imprisonment. The trial court judge sentenced Mr. Miller to seven years' imprisonment, and he appealed.

The district court of appeal for the Fourth District of Florida reversed Mr. Miller's sentence, finding that the application of the subsequently enacted guidelines to Mr. Miller violated the Ex Post Facto Clause. The court relied on this Court's decision in Weaver v. Graham, 450 U.S. 24 (1981). Miller v. State, 468 So.2d 1018 (Fla.Dist.Ct.App. 1985). The state sought discretionary review in the Florida Supreme Court.

Meanwhile, the Florida Supreme Court in State v. Jackson, 478 So.2d 1054 (Fla. 1985) held that retroactive application of amendments to the sentencing guidelines do not violate the Ex Post Facto Clause. Two judges dissented, relying on Weaver v. Graham. The Florida Supreme Court then reversed the decision of the district court in this case relying on its prior decision in Jackson. State v. Miller, 488 So.2d 820 (Fla. 1986). Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

After petitioner committed the crimes in question, Florida amended its sentencing guidelines for the specific purpose of increasing sentences for offenders. The state court applied the after-passed amended guidelines to Mr. Miller for a crime committed before the effective date of the amended guidelines. Thus, the state substantially increased petitioner's sentence by use of a law passed after he committed the crimes in question.

A law violates the Ex Post Facto Clause where it materially alters the situation of the accused to his disadvantage. Weaver v. Graham, 450 U.S. 24, 34 (1981). In Weaver, a prisoner requested habeas corpus relief claiming that a statute which

altered the method of prisoner gain-time computation and which was enacted subsequent to the crime for which the prisoner was incarcerated affected him detrimentally and was therefore ex post facto. The Court held that the statute violated the constitutional prohibition against ex post facto laws. The Court noted:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id., 30-31. Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question. Id., 33.

Under Weaver, the application of the amended sentencing guidelines to Mr. Miller violated the Ex Post Facto Clause. Mr. Miller's sentence went from four years to seven years as a consequence of the amendment. Hence, the state has deprived him of rights secured by the Constitution, and this Court should issue the writ and direct respondent to resentence petitioner.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

ANTHONY CALVELLO
Assistant Public Defender

GARY CALDWELL
Assistant Public Defender

Counsel for Petitioner

STATE of Florida, Petitioner,

v.

James Ernest MILLER, Respondent.

No. 67276.

Supreme Court of Florida.

May 8, 1986.

Rehearing Denied June 24, 1986.

Jim Smith, Atty. Gen. and Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, for petitioner.

Richard L. Jorandby, Public Defender, and Anthony Calvello and Gary Caldwell, Asst. Public Defenders, 15th Judicial Circuit, West Palm Beach, for respondent.

ADKINS, Justice.

In *Miller v. State*, 468 So.2d 1018 (Fla. 4th DCA 1985), the court vacated Miller's sentence because he was sentenced pursuant to the guidelines in effect at the time of sentencing as opposed to the guidelines in effect at the time the crime was committed. In *State v. Jackson*, 478 So.2d 1054 (Fla. 1985), we held that the trial court may sentence a defendant pursuant to the guidelines in effect at the time of sentencing.

Accordingly, the decision of the district court is quashed.

It is so ordered.

BOYD, C.J., and OVERTON and McDONALD, JJ., concur.

EHRLICH, J., concurs specially with an opinion, in which SHAW, J., concurs.

EHRLICH, Justice, concurring specially.

I concur because of this Court's decision in *State v. Jackson*, 478 So.2d 1054 (Fla. 1985), but I adhere to the views expressed in my dissent therein.

SHAW, J., concurs.

STATE of Florida, Appellant,

v.

William Thomas ZEIGLER, Jr., Appellee.

William Thomas ZEIGLER, Jr., Petitioner,

v.

STATE of Florida, Respondent.

Nos. 68774, 68765.

Supreme Court of Florida.

May 19, 1986.

Motion was filed seeking vacation of convictions and death sentences. The Circuit Court, Duval County, Gary L. Formet, J., granted stay of execution. The State appealed that ruling and filed a motion to vacate stay. The Supreme Court held that: (1) defendant was not entitled to new sentencing proceeding, and (2) record conclusively required denial of relief.

Ordered accordingly.

Barkett, J., filed a dissenting opinion.

1. Criminal Law ⇐999(21)

The Supreme Court decision in *Harvard v. State* holding that a defendant under sentence of death is entitled to a new sentencing proceeding when sentencing judge limits his consideration of mitigating circumstances to those enumerated in statute and that such ruling may be properly granted in a successive proceeding for vacation of conviction did not apply to instant case in the absence of statement by trial judge that he did not consider nonstatutory mitigating circumstances in imposing death sentence. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐999(21)

Record conclusively required denial of relief on successive petition seeking vacation of convictions for m... sentences imposed thereof. RCrP Rule 3.850.

H. Vernon Davids of H... P.A., Englewood, and La... ing, Capital Collateral ... Mark E. Olive, Litigation ... ven H. Malone, Senior A... eral Representative and ... Asst. Capital Collateral R... fice of the Capital Collat... tive, Tallahassee, for p...

Jim Smith, Atty. Gen. ... Prospect, Asst. Atty. Gen. ... for respondent/appellant.

PER CURIAM.

William Thomas Zeigl... tence of death, filed a m... Florida Rule of Criminal ... seeking vacation of his c... counts of murder and th... imposed therefor. On M... circuit court granted a st... tion scheduled for May 2... it an opportunity to hol... hearing on one claim of ... The state has appealed th... filed a motion to vacate th... jurisdiction. Art. V, § 3(... *See State v. Henry*, 45... 1984). We reverse that p... the trial court granting ... hearing, deny Zeigler al... grant the state's motion t... Zeigler also applies for ... eorum nobo, which we d...

Zeigler was convicted ... first-degree and two co... gree murder in July, 19... ommended life sentence... degree murder convictio... however, imposed two ... The convictions and se... firmed by this Court up... *v. State*, 402 So.2d 3... *denied*, 455 U.S. 1035, ... L.Ed.2d 153 (1982).

...partment of Health and Rehabilitative Services v. Alice P.*, 467 So.2d 1045, 1050 (Fla. 1st DCA 1985). *Cf. Medley Investors, Ltd. v. Levin*, 465 So.2d 1305 (Fla. 1st DCA 1985).

In that appellants cannot fall under the class action suit exception to the mootness doctrine, the survival of the substantive claims as to others does not save this case from dismissal as to appellants on the ground of mootness.

AFFIRMED.

ERVIN, C.J., and SMITH and NIMMONS, JJ., concur.

James Ernest MILLER, Appellant,

v.

STATE of Florida, Appellee.

No. 84-2188.

District Court of Appeal of Florida, Fourth District.

April 17, 1985.

Rehearing Denied June 3, 1985.

An appeal from judgment of the Circuit Court, Broward County, Russell E. ..., Jr., the District Court of Appeal held that harsher sentencing guidelines pertaining to sexual offenders that did not become effective until after defendant committed instant offense should not have been applied.

Sentence vacated, remanded.

1. Criminal Law ⇐1208.1(2)

Rule change that has disadvantageous effect on offender does not apply to crimes committed before the effective date of the rule change.

2. Criminal Law ⇐1208.1(2)

Harsher sentencing guidelines pertaining to sexual offenders that did not become effective until after defendant committed instant offense could not be applied.

Richard L. Jorandby, Public Defender, and Gary Caldwell, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

[1, 2] We vacate the sentence because the trial court erroneously applied a stiffening of the sentencing guidelines pertaining to sexual offenders, contained in the Florida Rules of Criminal Procedure, that did not become effective until after the appellant committed the instant offense. A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change. *See Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *State v. Williams*, 397 So.2d 665, 667 (Fla.1981); *Carter v. State*, 452 So.2d 953 (Fla. 5th DCA 1984); *Arnold v. State*, 429 So.2d 1319 (Fla. 2d DCA 1983).

We remand for resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed. We observe that the same sentence is possible if clear and convincing reasons for departure from the then applicable guidelines are stated in writing.

HERSEY, GLICKSTEIN and BARKETT, JJ., concur.

ON MOTION FOR REHEARING

PER CURIAM.

We deny appellee's motion for rehearing. In doing so, we would like to comment on two cases dealing with the amendments to the sentencing guidelines.

Hopper v. State, 465 So.2d 1269 (Fla. 3d DCA 1985), and *Frazier v. State*, 463 So.2d 458 (Fla. 2d DCA 1985), involved situations where the trial court applied the amendments to the sentencing guidelines at a hearing that took place before the effective date of the amendment. In reversing, the appellate court stated that the amended guidelines were not to be applied retroactively and remanded the case for resentencing in accordance with the guidelines in effect at the time of defendant's original sentencing.

These cases do not involve retroactive application. They involve application of the amendments to the guidelines before their effective date. Further, the court's language remanding for resentencing in accordance with the guidelines in effect at the time of the original sentencing is not inconsistent with our holding here, as the court was referring to the original guidelines which correlate their effective date to the date of a defendant's offense.

HERSEY, GLICKSTEIN and BARKETT, JJ., concur.

Paul Joseph COTE, Appellant,

v.

STATE of Florida, Appellee.

No. 84-1644.

District Court of Appeal of Florida, Fourth District.

May 8, 1985.

Rehearing Denied June 5, 1985.

Pursuant to guilty plea, defendant was convicted in the Circuit Court, Broward County, Mark A. Speiser, J., of armed robbery and aggravated assault. The court granted the State's written motion to depart from guidelines and sentenced defendant to four years of incarceration. Defendant appealed. The District Court of Appeal, Dell, J., held that: (1) departure from guidelines could be predicated upon unique circumstances where defendant did not merely burglarize home and assault female victim, but did so in presence of infant, late at night, stating that he was going to kill victim's husband, and (2) remand was required to permit trial judge to provide written statement delineating his reasons for the departure or, should judge elect not to provide written statement, for resentencing under guidelines in effect when crimes were committed rather than under amended guidelines which only subsequently became effective.

Reversed and remanded.

1. Assault and Battery ⇐100

Though assault, by definition, requires well-founded fear that violence is imminent and some degree of psychological trauma is already embodied in guidelines' recommended sentencing range for assault, departure from guidelines and sentence to a four-year prison term could be predicated upon unique circumstances where defendant did not merely burglarize home and assault female victim, but did so in presence of infant, late at night, stating that he was going to kill victim's husband.

2. Criminal Law ⇐1181.5(8)

Remand was necessary to permit trial judge to provide written statement delineating reasons for departure from sentencing guidelines or, should judge elect not to provide statement, for resentencing under guidelines in effect when crimes were committed rather than under amended guidelines which only subsequently became effective.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Robert L. Tettler, Asst. Atty. Gen., West Palm Beach, for appellee.

CHAPTER 5

SENTENCE

921.001 Sentencing Commission.—

(1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority to establish sentencing criteria and to provide for the imposition of criminal penalties, has determined that it is in the best interest of the state to develop, implement and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, there is created a Sentencing Commission which shall be responsible for the initial development of a statewide system of sentencing guidelines. After final development of a sentencing guidelines system by the Supreme Court, the commission shall evaluate these guidelines periodically and recommend such changes on a continuing basis as are necessary to ensure certainty of punishment as well as fairness to offenders and to citizens of the state.

(2)(a) The commission shall be composed of 15 members, consisting of: two members of the Senate, to be appointed by the President of the Senate; two members of the House of Representatives to be appointed by the Speaker of the House of Representatives; the Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice; three circuit court judges and one county court judge to be appointed by the Chief Justice of the Supreme Court; and the Attorney General or his designee. The following members shall be appointed by the Governor: one state attorney recommended by the Florida Prosecuting Attorneys Association; one public defender recommended by the Public Defenders Association; one private attorney recommended by the President of The Florida Bar; and two persons of the Governor's choice. The Chief Justice or the member of the Supreme Court designated by the Chief Justice shall serve as chairman of the commission.

(b) The members of the commission appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives shall serve 2-year terms, except that the initial appointees shall serve until January 1, 1987. The members appointed by the Chief Justice of the Supreme Court shall serve at his pleasure.

(c) Membership on the commission shall not disqualify a member from holding any other public office or from being employed by a public entity. The Legislature finds and declares that the commission serves a state, county, and municipal purpose and that service on the commission is consistent with a member's principal service in a public office or employment.

(d) Members of the commission shall serve without compensation but shall be entitled to be reimbursed for per diem and travel expenses as provided for in s. 112.061.

(e) The office of the State Courts Administrator shall act as staff for the commission and provide all necessary data collection, analysis, and research and support services.

(3) Following the initial development of statewide sentencing guidelines to the court, the commission shall meet annually or at the call of the chairman to review sentencing practices and recommend modifications to the guidelines. In establishing or modifying the sentencing guidelines, the commission shall take into consideration current sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors. For this purpose, the commission is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits.

(4)(a) Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases. The statewide sentencing guidelines shall be implemented by October

1, 1983, unless the Legislature affirmatively delays the implementation of such guidelines prior to October 1, 1983. The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

(b) The commission shall, no later than 45 days before the convening of the Legislature in regular session each year, make a recommendation to the members of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may within 60 days revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.

(c) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924.

(d) The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

(e) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of sentencing guidelines related to the commission on sentencing practices, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the department, and the Parole and Probation Commission, shall estimate the impact of any proposed sentencing guidelines on future rates of incarceration and levels of prison population. Such estimates shall be based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on department records reflecting average time served for offenses covered by the proposed guidelines. Projections of impact shall be reviewed by the commission and made available to other appropriate agencies of state government, including the Legislature.

(f) A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time; or

(c) As directed by an executive order granting clemency.

(g) The provisions of chapter 947 shall not be applied to such person.

921.005 Criteria for sentencing.—The courts shall use the following criteria for sentencing all persons who committed crimes before October 1, 1983:

(1)(a) A court shall not impose a sentence of imprisonment unless, after considering the nature and circumstances of the crime and the prior criminal record, if any, of the defendant, the court finds that imprisonment is necessary for the protection of the public because:

1. A lesser sentence is not commensurate with the seriousness of the defendant's crime; or

2. There is a probability that during the period of a suspended sentence or probation the defendant will commit another crime.

(b) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding a sentence of imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm.

2. The defendant did not know and had no reason to know that his criminal conduct would cause or threaten serious harm.

3. The defendant acted under a strong provocation.

4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

5. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that the victim sustained.

6. The defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.

7. The defendant's criminal conduct was the result of circumstances unlikely to recur.

8. The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

9. The defendant is particularly likely to respond affirmatively to noncustodial treatment.

(2)(a) A court shall sentence a defendant to pay a fine unless it finds that the defendant is unable or will be unable to pay the fine and the imposition of a fine will not prevent the defendant from being rehabilitated or from making restitution to the victim of his crime.

(b) A court shall sentence a defendant to pay a fine whenever the imposition of a fine is sufficient to punish the defendant and protect the public.

(c) A court shall sentence a defendant to pay a fine in addition to imprisonment or probation if, in the opinion of the court, the defendant has derived a pecuniary gain from his crime or the fine is specially adapted to deterrence of the particular crime or to the punishment and rehabilitation of the offender.

History.—

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—

921.12 Is alleged tence.—T physician has allege mourning, county in s formation

History.—

921.141 ment for determin

(1) SE PENALTY guilt of a th conduct a mine whe death or l 775.082. T trial judge t It, through unable to a ally, having trial judge provided in imposition waived or a tencing pro imposition fendant. In ered as to to the nat defendant of the agg mented or dence whi may be re the exclu fendant is a hearsay st not be rest evidence o the United Florida. T shall be pr sentence of

(2) AD JURY. A deliberate court, based (a) Wh exist in ex (b) Wh exist whi found to ex (c) Ba defendant of or death.

(3) FIN OF DEATH of a majo aggravating a sentence court impo

imprisonment. Thus excessive comments by the prosecutor directed to one of the two matters to be determined by the jury were capable of improperly influencing the jury on the other matter. The result of improper comment was therefore often a finding of prejudice.

Under the current capital felony sentencing law, the trial proceeds in two stages, with a guilt phase followed by a sentencing proceeding. Thus the jury does not hear evidence and argument directed specifically at the question of sentencing until the defendant's guilt of a capital felony has already been determined. There is thus no danger that a prosecutor's inflammatory remarks on the question of sentence will improperly influence the jury on the question of guilt or innocence.

Another major difference between the old and the new sentencing procedures is of course that under current law the jury's sentencing determination is advisory only. The trial judge imposes the sentence. Part of the judge's function is to guard against any improper emotional impact on the determination of the sentence and to assure that the sentence imposed is based upon objective evaluation of the crime and the

Even under the old sentencing procedure, prosecutorial references to the possibility of parole with a life sentence was held not prejudicial because the institution of parole is a matter of such common knowledge. *Paramore v. State*, 229 So.2d 855 (Fla.1969), *vacated on other grounds*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). There was a presumption that the trial judge was capable of controlling arguments of counsel and would keep them within proper bounds. *Id.*

Under the current sentencing law, we have rejected claims of improper comment at the sentencing phase where the comments did not appear to have prejudicially affected the final sentencing determination by the judge. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, —— U.S. ——, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982).

Although the likelihood that an offender will commit violent crimes in the future is not a statutory aggravating circumstance, we have recognized that the statutory circumstances, examined in their entirety, seem to point to such propensity as a relevant matter in the sentencing determination.

[W]e believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is a matter that can contribute to decisions as to sentence which will lead to uniform treatment.

Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

Because I believe that the prosecutorial comments in this case were not improper, and that if they did exceed the bounds of propriety they had no prejudicial impact on the final sentencing determination, I dissent from the judgment granting a new sentencing trial.

IN re RULES OF CRIMINAL PROCEDURE (SENTENCING GUIDELINES).

No. 63962.

Supreme Court of Florida.

Sept. 8, 1983.

Original Proceeding—Florida Rules of Criminal Procedure.

Robert Wesley, Staff Counsel, Tallahassee, for Sentencing Guidelines Com'n, petitioner.

PER CURIAM.

The Sentencing has proposed a r implement with comply with the its passage of utes (1983). A proved rule in T Court received suggestions reg The commissi tions at its final made several ch final version of Court.

We have consi the commissi been received, 3.701 and forw appended to th guidelines adop for all applicat 12.01 a.m., Oct tively selected tences imposed ble crimes sent

It is so ordered.

ALDERMAN TON, McDONA JJ., concur.

ADKINS, J.

FIL

RULE 3.701 LINES

a. This rule is with forms

b. Statement o

The purpose establish a uni guide the senten decision-making represent a syst theory and ha throughout the lines are intende variation in the ducing the subs

PER CURIAM.

The Sentencing Guidelines Commission has proposed a rule of criminal procedure to implement sentencing guidelines in order to comply with the action of the legislature in its passage of section 921.001, Florida Statutes (1983). After publication of the proposed rule in The Florida Bar News, the Court received numerous comments and suggestions regarding the proposed rule. The commission considered these suggestions at its final meeting, August 26, 1983, made several changes, and transmitted its final version of the proposed rule to this Court.

We have considered the proposed rule and the comments and suggestions which have been received, and we hereby adopt, as rule 3.701 and form 3.988, the rule and forms appended to this opinion. The sentencing guidelines adopted herein will be effective for all applicable offenses committed after 12:01 a.m., October 1, 1983 and, if affirmatively selected by the defendant, to sentences imposed after that date for applicable crimes occurring prior thereto.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD, ZEHMER and SHAW, JJ., concur.

ADKINS, J., dissents.

PROPOSED RULE

RULE 3.701. SENTENCING GUIDELINES

a. This rule is to be used in conjunction with form 3.988(a)-(i).

b. Statement of Purpose.

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.

2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.

3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories.

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1. Murder, manslaughter: Chapter 782 (except subsection 782.04(1)(a)(1) and subsection 316.193(3)(c)2.)

Category 2. Sexual offenses: Chapters 794 and 800 and section 826.04.

Category 3. Robbery: Section 812.13.

Category 4. Violent personal crimes: Chapters 784 and 836 and section 843.01.

Category 5. Burglary: Chapter 810 and subsection 806.12(3).

Category 6. Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832.

Category 7. Drugs: Chapter 893.

Category 8. Weapons: Chapter 790.

Category 9. All other felony offenses.

d. General Rules and Definitions.

1. One guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.

2. "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

3. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined on the basis of the following:

a) The offense with the highest statutory degree, in the order of life felony, first-degree felony punishable by life, first-degree, second-degree, and third-degree felonies; and

b) In the event of two (2) or more offenses of the same degree, by the lowest numerical offense category.

4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.

5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the instant offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.

1) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.

2) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.

3) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. When the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.

4) Prior record shall include criminal traffic offenses, which shall be scored as misdemeanors.

5) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.

b) Adult record. An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later, to the date of the instant offense.

c) Juvenile record. All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the current conviction and which would have been criminal if committed by an adult, shall be included in prior record.

6. Legal status at time of offense is defined as follows:

Offenders on parole, probation, or community control, in custody serving a sentence, escapees, fugitives who have

fled to avoid prosecution or who have failed to appear for a judicial proceeding or who have violated conditions of a supersedeas bond, and offenders in pretrial intervention or diversion programs.

7. Victim injury shall not be scored if not a factor of an offense at conviction.

8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.

9. Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

10. Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

12. Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.

13. Community control, a form of intensive supervised custody in the community involving restriction of the freedom of the offender, is a sanction which the court may impose upon a finding that probation is an unsuitable disposition. When community control is imposed, it shall not exceed the term provided by general law.

COMMITTEE NOTE: *(a) The operation of this rule is not intended to change the law or requirements of proof as regards sentencing.*

(b) These principles are binding on the sentencing court.

(c) Only one category is proper in any particular case. Category 9, "All Other Felony Offenses," should be used only when the primary offense at conviction is not included in another, more specific category. The guidelines do not apply to capital felonies.

Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by ch. 777.

If a defendant is to be sentenced for a probation violation, and the sentencing judge elects to revoke probation, the new sentence must be in accordance with the guidelines.

(d)(1) Ultimate responsibility for assuring that scoresheets are accurately prepared rests with the sentencing court. Due to ethical considerations, defense counsel may not be compelled to submit a scoresheet. Probation and parole officers may be directed to compile guidelines scoresheets only when a presentence investigation has been ordered. The forms for calculating the guidelines are forms 3.988(a)-(i).

(d)(2) This definition applies to both instant offense and prior record scoring.

(d)(3) The proper offense category is identified upon determination of the primary offense. When the defendant is convicted of violations of more than one unique statute, the offenses are to be sorted by statutory degree. In the event of multiple offenses of the same statutory degree, the primary offense is identified by the corresponding offense category with the lowest numerical designation.

(d)(4) No points shall be scored for lesser and included offenses, or for offenses which are the same as offenses within the same act or transaction.

(d)(5) Each separate prior felony and misdemeanor conviction in an offender's prior record which amounts to a violation of Florida law shall be scored, unless discharged by the passage of time. Any uncertainty in the scoring of the defendant's prior record shall be resolved in favor of the defendant, and disagreement as to the propriety of scoring specific entries in the prior record should be resolved by the trial judge.

Prior record includes all offenses for which the defendant has been found guilty, regardless of whether adjudication was withheld or the record has been expunged.

Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the commission for the instant offense.

(d)(6) This provision implements the intention of the commission that points for victim injury be added only when the defendant is convicted of an offense treated as either primary or additional offenses which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma.

(d)(8) The first guideline cell in each category (any nonstate prison sanction) allows the court the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone or any nonincarcerative disposition. The presumptive sentences in the succeeding grids refer to commitments to state prison. The presumptive sentences are found in forms 3.988(a)-(i).

(d)(10) If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category.

(d)(11) The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted.

Sentences under provisions of the Youthful Offender Act (ch. 958), the Mentally Disordered Sex Offender Act (ch. 917) or which require participation in drug rehabilitative programs (sec. 397.12) need not conform to the guidelines.

(d)(12) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of paragraph 12 are complied with.

If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range, and the total sentence imposed cannot exceed the maximum guideline range.

(d)(13) Community control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure.

Form 3.990. Sentencing Guidelines

These forms are to be used in conjunction with Rule 3.701.

(a) Category 1: Murder, manslaughter. Chapter 782 (except subsection 782.04 (2nd and subsection 316.193(3)).

I Primary offense at conviction — Points

Number of Counts

Degree	1	2	3	4+
Life	165	258	296	330
1st	138	165	228	285
2nd	77	90	106	123
3rd	48	55	65	73

II Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+
Life	61	73	79	85
1st	29	37	39	41
2nd	16	19	21	22
3rd	10	12	13	14
MM	2	3	4	5

III Prior record

Number of Prior Convictions

Degree	1	2	3	4+
Life	30	159	200	270
1st	30	66	90	102
2nd	15	33	49	61
3rd	5	11	19	27
MM	1	2	4	6

IV Legal status at time of offense
No restrictions 0
Legal restraint 20

V Victim injury (physical)
None 0
Slight 7
Moderate 14
Death or severe 21
Total

11

Category 1 (Homicide)

Points	Recommended Range
98	any non-state prison sanction
47-92	Community Control or 12-30 mos. incarceration
93-115	5 yrs. incarceration (3-7)
116-164	10 (7-12)
165-225	15 (12-17)
226-285	20 (17-22)
286-340	25 (22-27)
346-396	30 (27-40)
402+	Life

(b) Category 2 Sexual offenses Chapters 794 and 800 and section 826.04

I Primary offense at conviction — Points

Number of Counts

Degree	1	2	3	4+
Life	228	262	280	310
1st	169	216	234	252
2nd	132	138	172	195
3rd	124	149	161	174

II Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+
Life	44	58	68	97
1st	35	43	56	78
2nd	26	31	40	56
3rd	25	30	39	55
MM	5	6	9	11

III Prior record

Degree
Life
1st
2nd
3rd
MM

IV Legal status
Under
Under

V Victim injury
None
Slight
Moderate
Death

12

III. Prior record

Number of Prior Convictions

Degree	1	2	3	4 +	
Life	264	320	430	1080	____
1st	154	330	440	660	____
2nd	80	130	202	330	____
3rd	26	58	81	130	____
MM	5	10	15	20	____

IV. Legal status at time of offense
- Under no restrictions 0
- Under legal constraint 30 ____

V. Victim injury (physical)
- No contact 0
- Contact but no penetration 20
- Penetration or slight injury 40
- Death or serious injury 80

Total ____

Category 2—Sexual Offenses

Points	Recommended Range
130-169	any non-state prison sanction
170-196	Community Control or 12-30 mos. incarceration
196-207	3 yrs. incarceration (2½-3½)
208-229	4 years (3½-4½)
230-250	5 (4½-5½)
251-278	6 (5½-7)
279-312	8 (7-9)
313-354	10 (9-12)
355-422	15 (13-17)
423-496	20 (17-22)
497-546	25 (22-27)
547-582	30 (27-40)
583 +	Life

(c) Category 3 Robbery Section 812.13

I Primary offense at conviction Points

Number of Counts

Degree	1	2	+3	4 +	
Life	102	122	138	140	
1st punishable by life	82	94	107	115	
1st	70	84	91	102	
2nd	50	60	65	70	
3rd	38	41	44	54	____

II Additional offenses at conviction

Number of Counts

Degree	1	2	3	4 +	
Life	20	24	28	29	
1st	14	17	20	19	
2nd	10	12	13	14	
3rd	7	8	9	10	
MM	1	2	3	4	____

III A Prior record

Number of Prior Convictions

Degree	1	2	3	4 +	
Life	180	220	330	440	____
1st	90	120	180	270	____
2nd	30	60	90	130	____
3rd	10	25	35	45	____
MM	2	5	8	12	____

B Prior convictions for Category 3 offenses

Number prior convictions ____ × 25 = ____ ____

IV Legal status at time of offense
- No restrictions 0
- Legal constraint 17 ____

V Victim injury (physical)
- None 0
- Slight 7
- Moderate 10
- Death or severe 25

Total ____

Category 3 (Robbery)

Points	Recommended Range
56-53	any non-state prison sanction
54-60	Community Control or 12-30 mos. incarceration
66-01	2 years incarceration (2½-3½)
02-101	4 years (3½-4½)
102-121	5 (4½-5½)
122-151	6 (5½-7)
152-160	8 (7-9)
184-229	10 (9-12)
230-256	15 (13-17)
256-287	20 (17-22)
288-417	25 (22-27)
418-453	30 (27-40)
454 +	Life

(d) Category 4. Violent personal crimes: Chapters 784 and 806 and section 860.01

I. Primary offense at conviction

Number of Counts

Degree	1	2	3	4 +
1st	167	176	191	206
2nd	102	120	136	146
3rd	72	90	95	102

II. Additional offenses

Number of Counts

Degree	1	2	3	4 +
1st	29	35	39	41
2nd	21	25	27	29
3rd	15	19	20	23
NOI	3	4	5	7

III. Prior record

Number of Prior Convictions

Degree	1	2	3	4 +
Life	90	139	160	250
1st	70	96	98	142
2nd	35	50	69	93
3rd	5	11	19	27
NOI	1	2	4	6

IV. Legal status at time of offense

No restriction	0
Legal restraint	16

V. Victim injury (physical)

None	0
Slight	52
Moderate	24
Death or severe injury	36

Total

Category 4 (Violent Personal Crimes)

Points	Recommended Range
79-132	any non-state prison sanction
133-154	Community Control or 12-30 mos. incarceration
155-176	3 years incarceration (2½-3½)
177-202	4 years (3½-4½)
203-206	5 (4½-5½)
207-229	6 (5½-7)
229-254	8 (7-9)
255-282	10 (9-12)
283-332	15 (13-17)
333-412	20 (17-22)
413-472	25 (22-27)
473-529	30 (27-40)

(c) Category 5: Burglary. Chapter 810 and subsection 806.13(3)

I. Primary offense at conviction — Points

Number of Counts

Degree	1	2	3	4+
Life	80	96	104	112
1st	60	72	78	84
2nd	30	36	39	42
3rd	20	24	26	28

II. Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+
Life	16	19	21	23
1st	12	14	16	17
2nd	6	7	8	9
3rd	4	5	6	7
MM	1	2	3	4

III. A. Prior record

Number of Prior Convictions

Degree	1	2	3	4+
Life	60	120	230	417
1st	36	78	126	194
2nd	18	39	62	96
3rd	6	13	21	33
MM	1	2	3	4

B. Prior conviction for Category 5 offenses:

Number prior convictions ____ × 5 = ____ ____

IV. Legal status at time of offense:

No restriction	0
Legal constraint	10

V. Victim injury (physical):

None	0
Slight	5
Moderate	10
Death or severe	15

Total ____

Category 5 (Burglary)

Points	Recommended Range
28–40	any non-state prison sanction
47–71	Community Control or 12–30 mos. incarceration
72–90	3 yrs. incarceration
91–106	4 years (3½–4½)
107–120	5 (4½–5½)
121–143	6 (5½–7)
144–164	8 (7–9)
165–205	10 (9–12)
206–251	15 (12–17)
252–327	20 (17–22)
328–385	25 (22–27)
386–445	30 (27–40)
445 +	Life

(f) Category 6: Theft, forgery, fraud: Chapters 322, 409, 443, 812 (except section 812.131), 831, 832, 831 and 832

I. Primary offense at conviction — Points

Number of Counts

Degree	1	2	3	4+
Life	96	104	112	120
1st	72	84	90	96
2nd	36	42	48	54
3rd	12	14	17	18

II. Additional of

Degree
Life
1st
2nd
3rd
MM

III. A. Prior re

Degree
Life
1st
2nd
3rd
MM

B. Prior

IV. Legal status

No re
Legal

V. Victim

None
Slight
Moder
Death

II. Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+	
Life	17	20	22	24	
1st	14	17	18	19	
2nd	7	8	9	10	
3rd	3	4	5	6	
MM	1	2	3	4	

III. A. Prior record

Number of Prior Convictions

Degree	1	2	3	4+	
Life	50	110	180	270	
1st	30	66	96	162	
2nd	15	33	48	81	
3rd	5	11	16	27	
MM	1	2	4	6	

B. Prior conviction for Category 6 offenses

Number prior convictions ____ x 3 = ____

IV. Legal status at time of offense

No restrictions	0
Legal constraint	6

V. Victim injury (physical)

None	0
Slight	3
Moderate	6
Death or severe	9

Total ____

Points	
1+	
12+	
36+	
85	
174	

Category 6 (Thefts, Forgery, Fraud)

Points	Recommended Range
13-36	any non-state prison sanction
37-56	Community Control or 12-30 mos. incarceration
57-74	3 yrs. incarceration (2½-3½)
75-99	4 years (3½-4½)
91-104	5 (4½-5½)
105-122	6 (5½-7)
123-146	8 (7-9)
147-180	10 (9-12)
181-240	15 (13-17)
241-300	20 (17-22)
301-360	25 (22-27)
361-420	30 (27-33)
421+	Life

(g) Category 7 Drugs. Chapter 893

I. Primary offense at conviction — Points

Number of Counts

Degree	1	2	3	4+
Life	151	191	196	211
1st	107	166	179	192
2nd	65	79	84	98
3rd	42	50	55	59

II. Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+	
L/O	59	86	29	62	____
1st	27	88	45	10	____
2nd	11	16	17	3+	____
3rd	6	10	11	12	____
MM	2	3	4	5	____

III. Prior record

Number of Prior Convictions

Degree	1	2	3	4+	
L/O	66	130	230	290	____
1st	35	59	126	160	____
2nd	19	39	61	90	____
3rd	6	13	23	50	____
MM	1	2	3	4	____

IV. Legal status at time of offense

No restriction	0	
Legal constraint	10	____

Points

V. Victim injury (physical)

None	0	
Slight	3	
Moderate	6+	
Death or severe	15	

Total ____

Category 7 (Drugs)

Points	Recommended Range
61-75	any non-state prison sanction
76-110	Community Control or 12-30 mos. incarceration
111-130	3 years incarceration (2½-3½)
131-147	4 years (3½-4½)
148-162	5 (4½-5½)
163-196	6 (5½-7)
197-250	8 (7-9)
251-284	10 (9-12)
285-304	15 (12-17)
305-360	20 (17-22)
361-423	25 (22-27)
424-483	30 (27-40)
484 +	Life

(See Category 8, Weapons, Chapter 784)

I. Primary offense at conviction

Points

Number of Counts

Degree	1	2	3	4+	
1st	70	88	93	98	____
2nd	40	52	58	65	____
3rd	15	19	20	23	____

II Additional offenses

Number of Counts

Degree	1	2	3	4+	Points
1st	10	17	20	22	
2nd	9	11	12	13	
3rd	3	4	5	6	
MM	1	2	3	4	

III Prior record

Number of Prior Convictions

Degree	1	2	3	4+	Points
Life	10	20	40	60	
1st	6	12	24	36	
2nd	3	6	12	18	
3rd	1	2	4	6	
MM	1	2	3	4	

IV Legal status at time of offense
No restrictions 0
Legal constraint 10 ____

V Victim injury (physical)
None 0
Slight 4
Moderate 8
Death or severe 10 ____

Total ____

Category 8 (Weapons)

Points	Recommended Range
15–49	any non-state prison sanction
50–75	Community Control or 12–30 mos. incarceration
76–91	3 years incarceration (2½–3½)
92–105	4 years (3½–4½)
106–115	5 (4½–5½)
116–133	6 (5½–7)
134–157	8 (7–9)
158–193	10 (9–12)
194–253	15 (12–17)
254–313	20 (17–22)
314–373	25 (22–27)
374+	30 (27–40)

(c) Category 9: All other felony offenses

I Primary offense at conviction

Number of Counts

Degree	1	2	3	4+	Points
Life	241	289	376	538	
1st (Punishable by life)	191	217	392	395	
1st	135	169	297	290	
2nd	108	130	140	130	
3rd	52	62	66	72	

II Additional offenses at conviction

Number of Counts

Degree	1	2	3	4+	Points
Life	49	58	75	105	
1st	27	32	60	59	
2nd	22	26	34	46	
3rd	10	12	16	22	
MM	2	3	4	5	

III A. Prior re

Degree	
Life	
1st	
2nd	
3rd	
MM	

IV. Legal statu
Under
Und
V. Victim injur
Non
Slight
Mode
Death

III A Prior record

Number of Prior Convictions

Degree	1	2	3	4 +	
Life	100	210	330	460	
1st	60	120	198	276	
2nd	30	63	99	138	
3rd	10	21	33	46	
MM	3	5	8	12	

IV Legal status at time of offense
Under no restriction 0
Under legal constraint 21

V Victim injury (physical)
None 0
Slight 8
Moderate 16
Death or severe 24

Total

Category 9
(All other felony offense category)

Points	Recommended Range
52-108	any non-state prison sanction
109-132	Community Control or 12-30 mos. incarceration
133-148	3 years incarceration (2½-3½)
149-162	4 years (3½-4½)
163-180	5 (4½-5½)
181-200	6 (5½-7)
201-240	8 (7-9)
241-282	10 (9-12)
283-348	15 (12-17)
349-410	20 (17-22)
411-470	25 (22-27)
471-506	30 (27-40)
507 +	Life 40 +

Fla. Cases 439 So.2d to 2d---4

THE FLORIDA BAR: AMENDMENT to RULES of CRIMINAL PROCEDURE (3.701, 3.988—SENTENCING GUIDELINES).

No. 65216.

Supreme Court of Florida.

May 8, 1984.

Original Proceeding—Florida Rules of Criminal Procedure.

Robert Wesley, Staff Counsel, Tallahassee, for the Sentencing Guidelines Com'n, petitioner.

PER CURIAM.

Acting under the provisions of section 921.001(4)(b), Florida Statutes (1983), the Sentencing Guidelines Commission has presented to this Court recommendations for changes in sentencing guidelines which require modification of criminal rules of procedure 3.701 and 3.988. We have reviewed the recommendations and approve the changes.* As with our original adoption of sentencing guidelines, *In re Rules of Criminal Procedure (Sentencing Guidelines)*, 439 So.2d 848 (Fla.1983), the Committee Notes adopted herein are part of these rules.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, J., dissents.

RULE 3.701. SENTENCING GUIDELINES

a. This rule is to be used in conjunction with forms 3.988(a)-(l).

* The essential changes and reasons therefor are:
1) Redefine "primary offense" (3.701(d)(1)). The existing definition has been criticized because it allows manipulation among the guideline categories. Because the proposed redefinition selects the category with the most severe punishment, it is anticipated that manipulation will be avoided.
2) Revise 3.701(d)(5)(a) to result in greater precision when determining prior record. The date of commission of the "primary offense" (defined at 3.701(d)(3)) will now be controlling.
3) Alter the time period for the calculation of juvenile prior record (3.701(d)(5)(c)). The existing provision makes juvenile record difficult to determine and hinges upon the date for the new conviction. The revision facilitates prior record determination by stopping the time period at the commission of the new offense. The revision includes a technical amendment to the Committee Note.
4) Redefine "victim injury" (3.701(d)(7)). This change makes clear that victim injury points are to be included when physical injury is an element of an offense at conviction.
5) Two revisions are made to 3.701(d)(11). The first change is technical in nature and better expresses the sentencing discretion of the court. The end of this paragraph has been revamped to replace the cumbersome language in the current rule. A change in the Committee Note is included to further express the intent of the Commission.
6) A new paragraph regarding violation of probation and community control is added to the rule (3.701(d)(14)).
7) Revisions have been made to the guidelines scoresheets (3.988(a)-(l)). Each form has been revised to permit scoring offenses and prior convictions in excess of four counts. Additionally, tables for first-degree felonies punishable by life have been included in 3.988(a) and (e) for primary offense purposes. The prior record sections of each form have been revised to include tables for scoring first-degree felonies punishable by life.
8) Increase the primary offense points in Category 2, Sexual Offenses, of rule 3.988, form (h). The revision increases the primary offense points by 20% and will result in both increased rates and length of incarceration for sexual offenders. This revision represents a substantial departure from pre-guidelines practice, but is consistent with the urgings of many commentators.
9) The Committee Note to 3.701(d)(4) has been restricted in scope to avoid confusion.
10) The Committee Note to 3.701(d)(8) has been amended to permit imposition of fines in accordance with prison sentences.
11) Language has been added to the Committee Note to 3.701(d)(11) which will require the sentencing court to disclose reasons for departing from the guidelines at the time the sentence is imposed.
12) The Committee Note to 3.701(d)(11), which discusses statutory alternatives, has been completely eliminated. While these statutory alternatives are acknowledged, the sentencing court is required to explain the guideline departure when an alternative program is used.
13) The Committee Note to 3.701(d)(12) has been revamped. This language will permit the sentencing court to impose probation terms consecutive to prison sentences, limited in length only by general law.

b. Statement of Purpose

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.
2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.
3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.
4. The severity of the sanction should increase with the length and nature of the offender's criminal history.
5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.
6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.
7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1: Murder, manslaughter: Chapter 782 [except subsection 782.04(1)(a)] and subsection 316.193(3).

Category 2: Sexual offenses: Chapters 794 and 800 and section 826.04.

Category 3: Robbery: Section 812.13.

Category 4: Violent personal crimes: Chapters 784 and 836 and section 847.01.

Category 5: Burglary: Chapter 810 and subsection 806.13(3).

Category 6: Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832.

Category 7: Drugs: Chapter 893.

Category 8: Weapons: Chapter 790.

Category 9: All other felony offenses.

d. General Rules and Definitions

1. One guideline score-sheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the score-sheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all score-sheets.
2. "Conviction" means a determination of guilt resulting from plea or trial regardless of whether adjudication was withheld or whether imposition of sentence was suspended.
3. ~~"Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined on the basis of the following:~~
~~a. The offense with the highest statutory degree, in the order of life felony, first degree felony punishable by life, first degree, second degree, and third degree felonies, and~~
~~b. In the event of two (2) or more offenses of the same degree, by the most numerical offense category.~~
4. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined in the following manner:
a) A separate guidelines scoresheet shall be prepared scoring each offense at conviction as the "primary offense at conviction" with the other offenses at conviction scored as "additional offenses at conviction."
b) The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant to these guidelines.
4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.
5. a) 'Prior record' refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the ~~instant~~ primary offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.
b) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.
c) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.
d) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. Where the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.
e) Prior record shall include criminal traffic offenses, which shall be scored as misdemeanors.
f) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.
b) Adult record: An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision or sanction, whichever is later, to the date of the instant offense.
c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the ~~current conviction~~ commission of the instant offense and which would have been criminal if committed by an adult, shall be included in prior record.
6. Legal status at time of offense is defined as follows:
Offenders on parole, probation, or community control, in custody serving a sentence, escapees, fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond, and offenders in pretrial intervention or diversion programs.
7. ~~Victim injury shall not be scored if it is an element of any offenses at conviction.~~
8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.

7. Victim injury shall be scored if it is an element of any offenses at conviction.
8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.
9. Mandatory minimum sentences: If the sentence required by the guidelines is less than the mandatory minimum sentence, the mandatory minimum sentence shall be imposed. Any sentence imposed outside the guidelines shall be subject to appellate review as provided by general law.
10. Sentencing guidelines implementation: If a defendant is convicted of a felony committed during the period of time that extends from October 1, 1983, to midnight, December 31, 1983, the trial court shall be required to sentence the defendant under the sentencing guidelines.
11. Departure from sentencing guidelines: If the sentence under the guidelines exceeds any statutory maximum, the statutory maximum sentence shall be imposed. If the sentencing court departs from the recommended guidelines sentence, it must state in writing clear and convincing reasons which must be based upon circumstances or factors that reasonably justify the departure. Such reasons for departure shall be made a part of the record and shall be stated on the scoresheet utilized by the court. Failure to comply with these requirements shall be subject to appellate review as provided by general law.
12. Sentencing guidelines cumulative: If a defendant is convicted of two or more felonies, the sentencing guidelines must be applied so that the sentences run consecutively pursuant to law. The guidelines may not be utilized to impose a single sentence which is lower than any of the sentences that must be imposed if each felony were considered separately.
13. Community control violations: If the defendant is being sentenced for a violation of community control, the sentencing court may impose any sentence which it could have imposed at the original sentencing proceeding.

9. Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

10. Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

11. Departures from the guideline sentence: Departures from the ~~presumptive sentence~~ guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. ~~Reasons for deviating from the guidelines shall not include factors relating to either current offense or prior arrests for which convictions have not been obtained.~~ Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

12. Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given. If a consecutive sentence is imposed, it shall not exceed the term provided by general law.

14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

COMMITTEE NOTE: *(a) The operation of this rule is not intended to change the law or requirements of proof as regards sentencing.*

(b) These principles are binding on the sentencing court.

(c) Only one category is proper in any particular case. Category 9, "All Other Felony Offenses," should be used only when the primary offense at conviction is not included in another, more specific category. The guidelines do not apply to capital felonies.

Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by ch. ____.

~~If a defendant is to be sentenced for a probation violation, and the sentencing judge elects to revoke probation, the new sentence must be in accordance with the guidelines.~~

(d)(1) Ultimate responsibility for assuring that scoresheets are accurately prepared rests with the sentencing court. Due to ethical considerations, defense counsel may not be compelled to submit a scoresheet. Probation and parole officers may be directed to compile guidelines scoresheets only when a presentence investigation has been ordered. The forms for calculating the guidelines are forms [######-##].

(d)(2) This definition applies to both instant offense and prior record scoring.

(d)(3) The proper offense category is identified upon determination of the primary offense. When the defendant is convicted of violations of more than one

unique statute, the offenses are to be sorted by statutory degree. In the event of multiple offenses of the same statutory degree, the primary offense is identified by the corresponding offense category with the lowest numerical designation.

(d)(4) No points shall be scored for lesser and included offenses. ~~so far offenses which are the same as offenses within the same act or transaction.~~

(d)(5) Each separate prior felony and misdemeanor conviction in an offender's prior record which amounts to a violation of Florida law shall be scored, unless discharged by the passage of time. Any uncertainty as to the scoring of the defendant's prior record shall be resolved in favor of the defendant, and disagreement as to the propriety of scoring specific entries in the prior record should be resolved by the trial judge.

Prior record includes all offenses for which the defendant has been found guilty, regardless of whether adjudication was withheld or the record has been expunged.

Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions in operation of this provision. However, such a juvenile adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the ~~conviction for~~ commission of the instant offense.

(d)(6) This provision implements the criterion of the commission that points for victim injury be added only when the defendant is convicted of an offense scored as either primary or additional offense which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma.

(d)(7) The first guideline cell in each category may mandate prison sanctions unless the court the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone or any nonincarcerative disposition. The presumptive sentences in the corresponding guidelines cells to commitments to state prison. Any presumptive sentence may exclude the requirement that a fine be paid. The presumptive sentences are found in forms [######-##].

(d)(8) If an offender is convicted under an enhancement statute, the enhanced degree should be used as the basis for scoring the primary offense in the appropriate category.

(d)(11) Reasons for departure shall be articulated at the time sentence is imposed. The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted. Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge.

~~Sentences under provisions of the Youthful Offender Act (ch. 958), the Mentally Disordered Sex Offender Act (ch. 917), or which require participation in drug rehabilitation programs (ch. 397) are not subject to the guidelines.~~

(d)(12) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of paragraph 11 are complied with.

If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range ~~and shall not exceed the maximum guideline range~~. nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

(d)(13) Community control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure.

(a) Category 1: Murder, Manslaughter

1. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	165	229	298	336	— + 60 = —
1st paroleable to life	170	193	276	306	— + 60 = —
1st	136	167	226	286	— + 60 = —
2nd	77	93	108	123	— + 15 = —
3rd	65	75	85	75	— + 10 = —

II Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	61	71	79	85	— + 6 = —
1st par.	45	54	59	63	— + 5 = —
1st	29	35	39	41	— + 4 = —
2nd	16	19	21	22	— + 1 = —
3rd	10	12	13	14	— + 1 = —
MM	2	3	4	5	— + 1 = —

III Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	95	130	180	230	— + 50 = —
1st par.	80	95	130	210	— + 70 = —
1st	50	68	90	162	— + 65 = —
2nd	35	50	65	95	— + 45 = —
3rd	5	11	20	37	— + 9 = —
MM	1	2	4	6	— + 2 = —

IV Legal status at time of offense

Supervision	5
Imprisonment	27

V Victim injury (physical)

Slight	7
Moderate	11
Severe or more	21

Points	Recommended Range
44-	any suitable prison sanction
45-52	Community Control or 12-30 mos. incarceration
53-131	5 years incarceration (61.7)
132-154	10 (77.1)
155-207	15 (102.15)
208-261	20 (127.25)
262-315	25 (152.37)
316-367	30 (177.45)
368+	Life

(b) Category 2: Sexual Offenses

I Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	292	314	349	384	— + 35 = —
1st	235	270	291	312	— + 21 = —
2nd	156	180	206	222	— + 16 = —
3rd	140	174	193	209	— + 16 = —

II Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	53	73	103	127	— + 24 = —
1st par.	47	59	82	99	— + 17 = —
1st	28	42	56	74	— + 18 = —
2nd	20	32	40	56	— + 16 = —
3rd	23	30	39	52	— + 13 = —
MM	1	4	7	11	— + 3 = —

III Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	95	130	180	230	— + 50 = —
1st par.	80	95	130	210	— + 70 = —
1st	50	68	90	162	— + 65 = —
2nd	35	50	65	95	— + 45 = —
3rd	5	11	20	37	— + 9 = —
MM	1	2	4	6	— + 2 = —

IV Legal status at time of offense

Supervision	5
Imprisonment	27

V Victim injury (physical)

Slight	7
Moderate	11
Severe or more	21

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4
Life	264	509	810	1149
1st pbl	211	424	648	890
1st	156	318	496	699
2nd	89	179	284	399
3rd	26	53	81	119
MM	3	10	15	20

Number of Points Above 4

— × 200 = —
— × 152 = —
— × 174 = —
— × 87 = —
— × 29 = —
— × 5 = —

IV. Legal status at time of offense

Under no restriction	0
Under legal constraint	20

V. Victim injury (physical)

No contact	0
Contact but no penetration	20
Penetration or slight injury	40
Death or serious injury	80

Points	Recommended Range
124-169	any nonstate prison sanction
170-185	Community Control or 12-30 mos. incarceration
186-207	3 years incarceration (30-3[illegible])
208-229	4 years (3[illegible]-4[illegible])
230-250	5 (4[illegible]-5[illegible])
251-272	6 (5[illegible]-7)
273-312	8 (7-9)
313-354	10 (9-12)
355-402	15 (12-17)
403-446	20 (17-22)
447-490	25 (22-27)
347-362	30 (27-33)
363	Life

...e 6 category 3. Robbery

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4
Life	162	322	533	748
1st pbl	92	58	107	159
1st	70	84	91	101
2nd	50	60	65	75
3rd	33	41	44	54

Number of Counts Above 4

— × 15 = —
— × 12 = —
— × 10 = —
— × 10 = —
— × 10 = —

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4
Life	20	24	26	28
1st pbl	17	20	22	24
1st	14	17	18	19
2nd	10	12	14	14
3rd	7	8	9	10
MM	1	2	3	4

Number of Counts Above 4

— × 2 = —
— × 2 = —
— × 1 = —
— × 1 = —
— × 1 = —
— × 1 = —

III. A. Prior record

Degree	Number of Prior Convictions 1	2	3	4
Life	186	216	330	460
1st pbl	95	168	264	365
1st	65	126	198	276
2nd	35	63	99	138
3rd	10	21	33	46
MM	2		6	12

Number of Points Above 4

— × 130 = —
— × 104 = —
— × 78 = —
— × [illegible] = —
— × 13 = —
— × 8 = —

B. Prior convictions for Category 3 of felonies

Number prior convictions ... × 25 =

V. Victim injury (physical)

None	0
Slight	7
Moderate	11
Death or severe	21

IV. Legal status at time of offense

No restrictions	0
Legal constraint	17

Points	Recommended Range
34–53	any nonstate prison sanction
54–65	Community Control or 12–30 mos. incarceration
66–81	2 years incarceration (20–3 ½)
82–101	4 years (31–4 ½)
102–121	5 (41–7 ½)
122–151	6 (57–7½)
152–181	8 (7–10)
182–209	10 (9–12)
210–245	15 (12–17½)
246–317	20 (17–22½)
318–417	25 (22–27½)
418–517	30 (27–33)
518	Life

(d) Category 4: Violent Personal Crimes

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	147	176	191	206	___ × 15 = ___
2nd	105	126	136	146	___ × 10 = ___
3rd	73	88	95	102	___ × 7 = ___

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	29	35	38	41	___ × 3 = ___
2nd	21	25	27	29	___ × 2 = ___
3rd	15	18	20	21	___ × 1 = ___
MM	3	4	5	6	___ × 1 = ___

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	50	110	160	270	___ × 90 = ___
1st PBL	40	80	128	216	___ × 80 = ___
1st	30	66	96	162	___ × 66 = ___
2nd	15	33	48	81	___ × 33 = ___
3rd	5	11	16	27	___ × 9 = ___
MM	1	2	4	6	___ × 2 = ___

IV. Legal stat
No restrictions
Legal constraint

IV. Legal status at time of offense

No restrictions	0
Legal restraint	16

V. Victim injury (physical)

None	0
Slight	11
Moderate	13
Death or severe injury	16

Points	Recommended Range
73-112	e.g. non-state prison sanction
113-134	Community Control or 12-30 mos. incarceration
135-176	3 yrs. incarceration (30-54)
177-192	4 years (43-64)
193-206	5 (48-72)
207-227	6 (51-75)
228-254	8 (57-96)
255-292	10 (69-120)
293-332	15 (132-177)
333-372	20 (157-225)
373-472	25 (192-271)
473-580	30 (227-40[illegible])

(a) Category 5: **Burglary**

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	80	96	104	112	___ × 8 = ___
1st pld	70	84	91	98	___ × 7 = ___
1st	60	72	78	84	___ × 6 = ___
2nd	30	36	39	42	___ × 3 = ___
3rd	20	24	26	28	___ × 2 = ___

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	16	19	21	23	___ × 2 = ___
1st pld	14	16	18	20	___ × 2 = ___
1st	12	14	16	17	___ × 1 = ___
2nd	6	7	8	9	___ × 1 = ___
3rd	4	5	6	7	___ × 1 = ___
MM	1	2	3	4	___ × 1 = ___

III. A. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	60	120	210	307	___ × 97 = ___
1st pld	48	104	165	240	___ × 74 = ___
1st	36	78	126	184	___ × 56 = ___
2nd	18	39	63	90	___ × 27 = ___
3rd	6	13	21	30	___ × 9 = ___
MM	1	2	3	4	___ × 1 = ___

B. Prior con[illegible] felonies

Number prior

IV. Legal statu

No restrictions

Legal restraint

(Cite as 451 So.2d 824) (1984)

II. Prior convictions for Category 5 of- fenses

Number prior convictions ... × 5 =

V. Victim injury (physical)

None	0
Slight	5
Moderate	10
Death or severe	15

IV. Legal status at time of offense

No restriction	0
Legal constraint	10

Points	Recommended Range
28–46	any nonstate prison sanction
47–71	Community Control or 12–30 mos. incarceration
72–90	3 years incarceration (2½–3½)
91–106	4 years (3½–4½)
107–120	5 (4½–5½)
121–143	6 (5½–7)
144–164	8 (7–9)
165–205	10 (9–12)
206–246	15 (12–17)
247–287	20 (17–22)
288–328	25 (22–27)
329–445	30 (27–30)
446+	Life

Category 6: **Thefts, Forgery, Fraud**

I Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	86	103	112	120	___ × 8 = ___
2nd	70	84	91	98	___ × 7 = ___
3rd	35	42	46	49	___ × 4 = ___
MM	13	16	17	18	___ × 1 = ___

II Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	17	20	22	24	___ × 2 = ___
1st pd	16	18	20	22	___ × 2 = ___
1st	11	17	16	19	___ × 1 = ___
2nd	7	8	9	10	___ × 1 = ___
3rd	3	4	5	6	___ × 1 = ___
MM	1	2	3	4	___ × 1 = ___

III # Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
1st	50	110	190	270	___ × 80 = ___
1st pd	10	80	130	210	___ × 70 = ___
2nd	15	40	48	84	___ × 30 = ___
3rd	5	11	18	27	___ × 9 = ___
MM	1	2	4	6	___ × 2 = ___

B. Prior convictions for Category 6 offenses

Number prior convictions ___ × 5 =

V. Victim injury (physical)

None	0
Slight	3
Moderate	6
Death or severe	9

IV. Legal status at time of offense

No restriction	0
Legal constraint	6

Points	Recommended Range
13-36	any nonstate prison sanction
37-56	Community Control or 12-30 mos. incarceration
57-74	2 years incarceration (27-37)
75-90	4 years (33-42)
91-104	5 (40-51)
105-122	6 (51-71)
123-146	8 (67-91)
147-180	10 (89-120)
181-240	15 (123-171)
241-300	20 (171-222)
301-360	25 (222-271)
361-420	30 (271-301)
421+	Life

(g) Category 7: Drugs

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	151	181	196	211	___ × 15 = ___
1st	137	164	178	192	___ × 14 = ___
2nd	65	78	84	91	___ × 7 = ___
3rd	42	50	55	59	___ × 4 = ___

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
Life	30	36	39	42	___ × 3 = ___
1st pbl	28	34	37	40	___ × 3 = ___
1st	27	32	35	38	___ × 3 = ___
2nd	13	16	17	18	___ × 1 = ___
3rd	8	10	11	12	___ × 1 = ___
MM	2	3	4	5	___ × 1 = ___

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	60	120	210	300	___ × 30 = ___
1st pbl	48	104	168	240	___ × 72 = ___
1st	36	78	126	180	___ × 54 = ___
2nd	18	39	63	90	___ × 27 = ___
3rd	6	13	21	30	___ × 9 = ___
MM	1	2	3	4	___ × 1 = ___

IV. Legal status at time of offense

No restriction	0
Legal constraint	14

V. Victim injury (physical)

None	0
Slight	5
Moderate	10
Death or severe	15

Points	Recommended Range
42–75	...ory nonstate prison sanction
76–113	Community Control or 12–30 mos. incarceration
114–133	3 years incarceration (30–3...)
134–147	4 years (33–4...)
148–162	5 (41–5...)
163–184	6 (51–7...)
185–208	8 (7–9)
209–261	10 (9–12)
262–304	15 (12–17)
305–364	20 (17–22)
365–424	25 (22–27)
425–485	30 (27–40)
486	Life

(b) Category 8: Weapons

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	70	83	91	98	... × 7 = ...
2nd	45	54	58	61	... × 3 = ...
3rd	15	18	20	21	... × 1 = ...

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4	Number of Counts Above 4
1st	14	17	18	19	... × 1 = ...
2nd	9	11	12	13	... × 1 = ...
3rd	3	4	5	6	... × 1 = ...
MM	1	2	3	4	... × 1 = ...

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Number of Priors Above 4
Life	10	20	40	60	... × 5 = ...
1st pbl	8	16	32	48	... × 4 = ...
1st	6	12	24	36	... × 3 = ...
2nd	3	6	12	18	... × 2 = ...
3rd	1	2	4	6	... × 1 = ...
MM	1	2	3	4	... × 1 = ...

IV. Legal status at time of offense

No restrictions	0
Legal restraint	4

V. Victim injury (physical)

None	0
Slight	4
Moderate	8
Death or severe	12

Points	Recommended Range
15–69	...ory nonstate prison sanction
70–75	Community Control or 12–30 mos. incarceration
76–90	3 yrs. incarceration (2...–3...)
91–105	4 years (3...–4...)
106–115	5 (4...–5...)
116–130	6 (5...–7...)
131–157	8 (7–9)
158–220	10 (9–12)
221–263	15 (12–17)
264–307	20 (17–22)
308–367	25 (22–27)
368	30 (27–40)

(1) Category 9: All Other Felony Offenses

I. Primary offense at conviction

Degree	Number of Counts			
	1	2	3	4
Life	241	299	356	426
1st punishable by life	161	217	282	385
1st	120	160	207	259
2nd	109	139	169	150
3rd	52	62	68	72

Number of Counts Above 4

— + 150 + —
— + 110 + —
— + 85 + —
— + 10 + —
— + 4 + —

II. Additional offenses at conviction

Degree	Number of Counts			
	1	2	3	4
Life	49	26	73	105
1st pbl	26	45	26	62
1st	27	32	42	59
2nd	22	26	34	49
3rd	10	12	16	22
MM	2	3	1	5

Number of Counts Above 4

— + 39 + —
— + 23 —
— + 17 —
— + 14 + —
— + 6 + —
— + 1 —

III. Prior record

Degree	Number of Prior Convictions			
	1	2	3	4
Life	190	230	330	460
1st pbl	90	160	264	364
1st	60	120	190	270
2nd	30	60	90	130
3rd	16	23	33	46
MM	2	3	8	12

Number of Priors Above 4

— + 100 + —
— + 104 + —
— + 70 —
— + 30 —
— + 12 —
— + 4 + —

IV. Legal status at time of offense

No restrictions 0
Legal restraint 25

V. Victim injury (physical)

None 0
Slight 4
Moderate 10
Death or severe 20

45

OPPOSITION

BRIEF

NO. 86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

QUESTION PRESENTED

WHETHER THE PETITIONER WAS PROPERLY SENTENCED UNDER AMENDED SENTENCING GUIDELINES WHERE THE AMENDMENTS WERE PROCEDURAL AND THUS THEIR APPLICATION TO THE PETITIONER WAS NOT IN CONTRAVENTION OF EX POST FACTO PRINCIPLES?

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TABLE OF AUTHORITIES

NO. 86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

OPINIONS BELOW

The Petitioner has accurately cited to the opinions below.

JURISDICTION

The Respondent accepts the Petitioner's statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement.

STATEMENT OF THE CASE

On April 25, 1984, the Petitioner committed the criminal offenses of sexual battery, burglary with an assault, and petit theft (R 24). He was sentenced on October 2, 1984, to a prison term of seven years, which was within the guidelines range under the sentencing guidelines as amended July 1, 1984 (R 25-26, SR). The

trial court sentenced the Petitioner under the 1984 amended guidelines because they were in effect on the day of his sentencing and the court reasoned they would apply because the statutory penalty was the same (R 11).

On appeal, the Florida intermediate appellate court held that even though the Petitioner was sentenced after the amended guidelines' July 1, 1984, effective date, the trial court should have sentenced the Petitioner pursuant to the original guidelines which were in effect on the date the crimes were committed. Miller v. State, 468 So.2d 1018 (4th DCA Fla. 1985). The State obtained review in the Florida Supreme Court, which reversed the Court of Appeal's decision. Relying on its earlier decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), the Florida Supreme Court held the guidelines in effect at the time of sentencing were properly used by the trial court. State v. Miller, 488 So.2d 820 (Fla. 1986). A copy of the Florida Supreme Court's opinion in State v. Jackson, supra, is attached as an appendix.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court has decided that application of the amended sentencing guidelines to sentencings after the amendments' effective date is not in contravention of the ex post facto clause of the Constitution. This decision is based on the underlying reasoning that the changes were merely procedural and not substantive.

The Florida Supreme Court relied on this Court's decision in Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, this Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by

which the penalty was being implemented, not the penalty itself, was changed. The Court stated:

> Petitioner views the change in the Florida death sentencing procedure as depriving him of a substantial right to have the jury determine, without review by the trial judge, whether that penalty should be imposed. We conclude that the changes in the law are procedural, and on the whole ameliorative,[6] [footnote omitted] and that there is no ex post facto violation.
>
> * * *
>
> In Beazell v. Ohio, 269 U.S. 167, 169-170, 70 L.Ed. 216, 46 S.Ct. 68 (1925), Mr. Justice Stone summarized for the court the characteristics of an ex post facto law:
>
> > It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.
>
> It is equally well settled, however, that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 160 U.S. 565, 590, 41 L.Ed. 1075, 16 S.Ct. 904 (1896). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U.S. 180, 183 [59 L.Ed. 905, 35 S.Ct. 507], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Beazell v. Ohio, supra, at 171, 70 L.Ed. 216, 46 S.Ct. 68.

Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. For example, in Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. Id., at 589, 28 L.Ed. 262, 4 S.Ct. 202.

In Thompson v. Missouri, 171 U.S. 380, 43 L.Ed. 204, 18 S.Ct. 922 (1898), a defendant was convicted of murder solely upon circumstantial evidence. His conviction was reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the court held that this change was procedural and not violative of the Ex Post Facto Clause.

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language from Hopt v. Utah, supra, applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. 110 U.S., at 589-590, 28 L.Ed. 262, 4 S.Ct. 202.
>
> In this case, not only was the change in the law procedural, it was ameliorative. It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law. Petitioner argues that the change in the law harmed him because the jury's recommendation of life imprisonment would not have been subject to review by the trial judge under the prior law. But it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life.
>
> Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling.

Id. at 432 U.S. 292, 293, 294.

If retroactive application of capital sentencing procedures is not an ex post facto violation, then neither is the application of the amended guidelines to an offense committed prior to their effective date. The statutory maximum penalty for the offense has not been altered, and had the original guidelines been followed, the trial court still could have exceeded the applicable term by entering an order setting forth its reasons for departure. Fla. R. Crim. P. 3.701(d)(11).

The issue presented in this case is controlled by Dobbert v. Florida, supra, and not by the decision on which the Petitioner relies, Weaver v. Graham, 450 U.S. 24 (1981). In Weaver v. Graham, the court found an ex post facto violation in the retroactive application of a statute reducing the amount of gain time prisoners could earn, because the quantum of punishment was changed to the prisoners' disadvantage. By contrast, in this cause the procedural amendments to the sentencing guidelines do not alter the statutory maximum penalty for

offenses. The recommended guidelines range can be exceeded up to the statutory maximum for the offenses, provided the trial court's reasons are stated in writing. Thus, the quantum of punishment has not been altered, but only the procedure for sentence imposition. Therefore, the Petitioner has not established any basis for this Court to exercise its certiorari jurisdiction.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Respondent respectfully requests that the Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

NO. 86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Joy B. Shearer, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above case to counsel for Petitioner, by depositing same in the United States Mail, first-class postage prepaid, addressed as follows:

Craig S. Barnard, Esquire
Chief Assistant Public Defender
Office of the Public Defender
The Governmental Center
301 North Olive Avenue
West Palm Beach, FL 33401

All parties required to be served have been served. Done this 22nd day of October, 1986.

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

JOINT

APPENDIX

No. 86-5344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST MILLER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

JOINT APPENDIX

RICHARD L. JORANDBY
Public Defender

CRAIG BARNARD *
Chief Assistant Public Defender

ANTHONY CALVELLO
Assistant Public Defender

GARY CALDWELL
Assistant Public Defender

9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, FL. 33401
(305) 820-2150
Counsel for Petitioner

* *Counsel of Record*

JIM SMITH
Attorney General

JOY B. SHEARER *
Assistant Attorney General

Elisha Newton Dimick Bldg.
Suite 204
111 Georgia Avenue
West Palm Beach, FL. 33401
(305) 837-5062
Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 22, 1986
CERTIORARI GRANTED NOVEMBER 17, 1986

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RELEVANT DOCKET ENTRIES

May 15, 1984	FILED: Information charging Petitioner with sexual battery, burglary and armed robbery
August 30, 1984	FILED: Judgment and conviction for sexual battery, burglary and petit theft
October 2, 1984	HEARING: Sentencing Hearing
October 2, 1984	FILED: *Fla.R.Crim.P.*, 3.701 Sentencing Guidelines Scoresheet
October 2, 1984	ORDER: Sentence upon Petitioner
April 17, 1985	OPINION: Vacating Sentence and remand for resentencing
April 26, 1985	FILED: Petition for Rehearing
June 5, 1986	OPINION: Rehearing Denied
May 8, 1986	OPINION: Florida Supreme Court quashes the Decision of the District Court of Appeal
May 14, 1986	FILED: Motion for Rehearing
May 15, 1986	FILED: Response to Motion for Rehearing
June 24, 1986	ORDER: Denying Motion for Rehearing

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

JAMES ERNET MILLER

INFORMATION FOR

I. SEXUAL BATTERY (ARMED) (LF)

II. BURGLARY W/ASSAULT (ARMED) (LF)

III. ARMED ROBBERY (LF)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeeth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that JAMES ERNET MILLER on the 25th day of April, A.D. 1984, in the County and State aforesaid, did unlawfully commit a Sexual Battery upon CHERYL THOMPSON, a person over the age of eleven (11) years, without her consent by causing his penis to penetrate or unite with the vagina of CHERYL THOMPSON and in the process thereof JAMES ERNET MILLER used or threatened to use a deadly weapon, to wit: a knife, contrary to F.S. 794.011(3); and

COUNT II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that JAMES ERNET MILLER on the 25th day of April, A.D. 1984, in the County and State aforesaid did unlawfully enter or remain in the structure to wit: a dwelling located at 760 N.E. 50th Court, Pompano Beach, Broward County, Florida, with the intent to commit the offense of Sexual Battery therein, and in the course thereof did commit a Battery upon CHERYL THOMPSON by actually and intentionally touching her against her will and in the course thereof JAMES ERNET MILLER did carry, display, use of threaten to use a weapon, to wit: a knife, contrary of F.S. 810.02(1), F.S. 810.02(2)(a), F.S. 784.03, and F.S. 775.087(1); and

IN THE CIRCUIT COURT,
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

84-307050

STATE OF FLORIDA

—*vs*—

JAMES ERNET MILLER
Defendant

JUDGMENT

The Defendant, JAMES ERNET MILLER, being personally before this Court represented by CAHTERINE KEUTHAN, his attorney of record, and having:

☒ Been tried and found guilty of the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree Of Crime
I.	Sexual Battery	794.011(5)	Life Felony
II.	Burglary W/Assault	810.02 (1)	Life Felony
III.	Petit Theft	812.04	Misdemeanor

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s)

• • • •

DONE AND ORDERED in Open Court at Broward County, Florida this 30 day of August A.D., 1984. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, James Ernet Miller and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/ Russell E. Seay, Jr.
Judge

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

Case No. 84-4759 CF

STATE OF FLORIDA,
Plaintiff,

vs.

JAMES ERNEST MILLER,
Defendant.

[SENTENCING HEARING]

Proceedings had and taken before the Honorable Russell E. Seay, Jr., one of the Judges of said Court, at the Broward County Courthouse, commencing at 9:00 o'clock a.m., on October 2, 1984, in the City of Fort Lauderdale, County of Broward, State of Florida, and being a Sentencing.

[Names of Counsel Omitted In Printing]

(Thereupon, the following proceedings were had:)

THE CLERK: James Ernest Miller.

MS. KEUTHAN: Good Morning, Judge.

THE COURT: Okay. This is James E. Miller, and you were charged—actually you were charged with a sexual battery, an armed sexual battery and a burglary with an assault. You had a jury trial and the jury found you guilty of sexual battery with slight force, which reduced it to a second degree felony, and also you were found guilty of a second degree burglary with an assault. That's a life felony.

MR. MALPAS: Yes, Judge, a first degree felony punishable by life.

THE COURT: Okay. A first degree felony punishable by life, and also, you were found guilty of a petty theft and sentenced to time served on that one.

MS. KEUTHAN: Right. Judge, that would bring it up to 60, not a 100 as is shown on the Presentence Investigation. It indicates—

THE COURT: Well, whatever it was, but the jury returned a verdict and the Court adjudicated the defendant guilty on those offenses at that time.

MR. MALPAS: That is correct, Judge.

THE COURT: So we are here today for sentencing.

Is there anything you want to say at this time as to why sentence should not be imposed?

MS. KEUTHAN: No legal cause, Judge, but I want to make a few comments as far as the guidelines are concerned.

The way they have scored him there is 4 points extra that should not be in there. This burglary was a life felony and doesn't change the category. There is about 3 points left over and when I scored it I was not aware the defendant had a second misdemeanor charge and that added 5 points and that put him over into this other category, but . . . I would be arguing that this probation officer and the State Attorney are using the wrong guidelines to score this defendant. They are using the newer

guidelines that go into effect July 2nd and the crime charged against this defendant occurred in April, well before the new guidelines came out.

I submit he should be under the old guidelines and not the new guidelines and if you did that, he would be scored in the range of three and a half to four and a half years, if you scored him under the sexual battery category. I don't believe under the rules the State is allowed to choose which category they wish, as far as the greater punishment involved, but it is my feeling, Judge, that he should not be scored under the new guidelines.

The State and this probation officer are scoring him under the category of five and a half to seven years, but I submit to you, Judge, it should be three and a half to four and a half years and I think that is sufficient in this case.

Also, I guess I will address these one at a time because the State has filed a motion to have Your Honor aggravate this defendant. Do you have a copy of that, Judge?

THE COURT: Yes.

MS. KEUTHAN: I guess I will address them one at a time, Judge.

The State has indicated in Number 1 that the victim, Cheryl Thompson, although she is not suffering permanent physical injuries, but they state she was terrified for more than an hour during this incident and she has suffered severe emotional distress since the morning of this attack and since that time as well. Clearly, under the guidelines, this is not allowed.

Secondly, they indicate that the jury, by their verdicts, have inferred that the defendant committed perjury. I strenuously object to that. They found him guilty, which means they disallowed some of the defendant's testimony, but they also disallowed some of the victim's testimony. So, we are arguing that the defendant and the victim did not perjure themselves, rather than that the jury clearly rejected that portion of the defendant's and the victim's testimony. They indicated by their verdicts that they felt

the sexual battery did take place against the victim's will, but he used slight force and this burglary with an assault, the same thing, Judge. They felt that he entered this house without her permission and there was no weapon and they agreed with the victim's version, in that sense.

So, I don't think that Number 1 and 2 is any reasonable grounds to aggravate this sentence.

If you will look at Numbers 3 and 4, their reasons for aggravating this sentence, basically it is the same thing. They are saying this defendant didn't show any remorse and because of the defendant taking the stand that somehow he has committed perjury and somehow the defendant's attack on Mrs. Thompson has done irreparable damage to her relationship with her husband. That is not relevant at all. These are ridiculous grounds to put into a Motion to Aggravate and there is clearly no aggravating factors. This Court has nothing to do with their divorce or nothing to do with their family matters and the defendant here cannot be held responsible for any of their marital problems.

In closing, Judge, I would argue that all of those should not be considered and they are certainly no grounds to aggravate this defendant's sentence in this case. If you look at his record there was only one or two prior misdemeanors and on both of them he was placed on probation and he completed that probation successfully. I clearly think that three and a half to four and a half years, something in that range is warranted by the jury's verdicts. They found it not to be as horrible a situation as the State Attorney originally thought.

MR. MALPAS: Judge, I will let the Motion for Aggravation speak for itself. You heard the defendant testify and I think it is obvious that he committed perjury, but as for the sentencing guidelines, the first thing I would do is cite to the Court the case of McGrath vs. State which indicates, at least it is my opinion, it indicates that any sentence after July 1st will be under the new guidelines. That is the State's position. Even if that was

not the case, the defendant would be sentenced under the burglary with the new guidelines as opposed to the sexual battery because that is the higher degree of crime.

I think if you will look at the burglary and the McGrath vs. State case, it says if you are going to be sentenced after July 1st you are not entitled to the benefits of youthful offender and as under the guidelines it indicates to me that I think very careful reading of it says he is not entitled to that particular part. He is not entitled to any of it. So, I agree that McGrath says he should be sentenced under the new guidelines.

Also, Judge, staying inside the guidelines will be a travesty of justice. I think what he did to Mrs. Thompson was an act of terrorism. This thing could have turned out much worse that it did. I think Your Honor heard all of this testimony in this case and I think Your Honor is going to make a wise decision on this sentencing and I think it will be a fair and just decision and I think it would be fair and just to go outside of the guidelines and give him more than this three and a half or four years, and I am requesting you give him 7 years, the 7 years that the probation officer and the State is asking for.

THE COURT: Well, under the sexual battery you could ask him to be aggravated, although that is actually a rape or if there was penetration or—

MR. MALPAS: Well, Judge, there is a difference between going into a home and holding a knife to someone's throat and pulling someone off of the streets. This was pure terrorism. To me that takes it up and—

MS. KEUTHAN: That's why the State charged him with the burglary, because he entered this home.

Again, Judge, the State is saying that aggravation is warranted and I don't think it is. These are no grounds for aggravation of this sentence and they should have never have been stated in this motion. They are ridiculous. You can't come in here and claim there has been trauma done to the victim, otherwise we would have that in every case. Those are not grounds to go outside of the

guidelines. They are indicating that by taking the stand the defendant has committed perjury, and they are indicating to the Court that because the defendant chose to exercise his constitutional right, that because of that they are wanting you to hit him with more time and—

THE COURT: Well, the penalty is still the same. It's what the probation officer has chose to do with these guidelines and you are looking to see when this offense occurred and the State is making their recommendation and they have elected to go under the new guidelines.

Why can't they say when they are going to be in effect?

MS. KEUTHAN: They did, Judge. July 1st.

THE COURT: But as it applies to pending matters?

MS. KEUTHAN: Judge, it is law, and you cannot go outside the guidelines—

THE COURT: It's not a law.

MR. MALPAS: It's still inside the statutory period of incarceration. I cannot see her argument. I would also like to make another comment.

I agree with defense counsel that he can take the stand, but he cannot take the stand and perjure himself and—

THE COURT: Well, I will resolve this real quick.

I will say that every time the jury doesn't totally believe a witness, that is not perjury. We all know there is always conflicts in the testimony, so I don't think he has committed perjury, the jury just didn't believe all of his testimony.

However, I do think the guidelines apply because it's a good chance that at the time of sentencing being imposed the statutory penalty is the same as the one that may have been imposed before the guidelines, but anyway.

All right. Then, saying nothing is sufficient, the defendant having been found guilty and having an opportunity to state why his sentence should not be imposed, he has been adjudicated guilty of sexual battery with slight force and also adjudicated guilty of a burglary with assault, I will say I will stay within the new guidelines.

On Count I, the sexual battery with slight force, the defendant is hereby committed to the custody of the Department of Corrections to be imprisoned for a term of 7 years. Also, as to Count II, burglary with assault, also it is the sentence of the Court that he be imprisoned for a term of 7 years, to run concurrent with Count I.

You have the right to appeal this sentence and if you wish to do so you have 30 days from today to file your notice of appeal. If you cannot afford an attorney, notify the Court and one will be appointed to represent you.

• • • •

Category 2: Sexual Offenses
Chapter 794 and 800 and section 826.04

1 PRIMARY OFFENSE	2 COUNTY	4 JUDGE	5 DATE OF SENTENCE
84-4759CF	BROWARD	RUSSELL E. SEAY, JR.	10-02-84

3 ADDITIONAL OFFENSE(S)	6 NAME	7 DATE OF BIRTH	8 SEX
NONE	MILLER, JAMES ERNET	12-11-63	X M F

9 DATE OF OFFENSE	10 PRIMARY OFFENSE AT CONVICTION	11 DEGREE
04-25-84	COUNT I SEXUAL BATTERY WITH SLIGHT FORCE	2nd

12 PROBATION VIOLATION / COMMUNITY CONTROL VIOLATION	13 PLEA / TRIAL	14 GUIDELINE SENTENCE IMPOSED / DEPARTURE FROM GUIDELINE
	XTRIAL	

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	262	314	340	366	
1st	216	259	281	302	
2nd	158	190	206	222	158
3rd	149	179	193	209	

Primary offense counts in excess of four (from back) ____

II. Additional offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	44	53	69	97	44
1st pbl	40	48	62	88	
1st	36	43	56	78	
2nd	26	31	40	56	
3rd	25	30	39	55	
MM	5	6	8	11	5

Additional offense counts in excess of four (from back) ____

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Points
Life	264	530	810	1100	
1st pbl	211	424	648	880	
1st	158	318	486	660	
2nd	80	159	243	330	
3rd	26	53	81	110	
MM	5	10	15	20	10

Prior convictions in excess of four (from back) ____

IV. Legal status at time of offense

Under no restrictions	0	
Under legal constraint	30	0

V. Victim injury (physical)

No contact	0	
Contact but no penetration	20	
Penetration or slight injury	40	
Death or serious injury	85	40

Reasons for departure: Total 253

Guideline Sentence: 6 (5½-7)

Sentence imposed:

FOR OFFICE USE ONLY

Offense Code ____
T.S. ____
S.P. ____
Prob. ____
C.C. ____
C.J. ____

RUSSELL E. SEAY, JR.
Sentencing Judge

GENE MALPAS
State Attorney

JAMES ERNET MILLER/KATHY KUETMAN
Defendant/Defense Counsel

LISA L. HEALY
Scoresheet Preparer

2

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT,
BROWARD COUNTY, FLORIDA

SENTENCE

(As to Count I)

The Defendant, being personally before this Court, accompanied by his attorney, C. Keuthan, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE LAW that:

☒ The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned

☒ For a term of 7 years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Jail Credit

☒ It is further ordered that the Defendant shall be allowed a total of 160 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count II above.

SENTENCE

(as to Count II)

The Defendant, being personally before this Court, accompanied by his attorney, C. Keuthan, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE LAW that:

☒ The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned

☒ For a term of 7 years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Jail Credit

☒ It is further ordered that the Defendant shall be allowed a total of 160 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count I above.

In the event the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida is hereby ordered and directed to deliver the Defendant to

the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Broward County, Florida, this 2 day of October A.D., 1984.

/s/ Russell E. Seay, Jr.
Judge

DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

No. 84-2188

JAMES ERNEST MILLER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

April 17, 1985

Rehearing Denied June 5, 1985

PER CURIAM.

We vacate the sentence because the trial court erroneously applied a stiffening of the sentencing guidelines pertaining to sex offenders, contained in the Florida Rules of Criminal Procedure, that did not become effective until after the appellant committed the instant offense. A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change. *See Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *State v. Williams*, 397 So.2d 663, 665 (Fla. 1981); *Carter v. State*, 452 So.2d 953 (Fla. 5th DCA 1984); *Arnold v. State*, 429 So.2d 819 (Fla. 2d DCA 1983).

We remand for resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed. We observe that the same sentence is possible if clear and convincing reasons for departure from the then applicable guidelines are stated in writing.

HERSEY, GLICKSTEIN and BARKETT, JJ., concur.

ON MOTION FOR REHEARING

PER CURIAM.

We deny appellee's motion for rehearing. In doing so, we would like to comment on two cases dealing with the amendments to the sentencing guidelines.

Hopper v. State, 465 So.2d 1269 (Fla. 3d DCA 1985), and *Frazier v. State*, 463 So.2d 458 (Fla. 2d DCA 1985), involved situations where the trial court applied the amendments to the sentencing guidelines at a hearing that took place before the effective date of the amendment. In reversing, the appellate court stated that the amended guidelines were not to be applied retroactively and remanded the case for resentencing in accordance with the guidelines in effect at the time of defendant's original sentencing.

These cases do not involve retroactive application. They involve application of the amendments to the guidelines before their effective date. Further, the court's language remanding for resentencing in accordance with the guidelines in effect at the time of the original sentencing is not inconsistent with our holding here, as the court was referring to the original guidelines which correlate their effective date to the date of a defendant's offense.

HERSEY, GLICKSTEIN and BARKETT, JJ., concur.

SUPREME COURT OF FLORIDA

No. 67276

STATE OF FLORIDA,
Petitioner,

v.

JAMES ERNEST MILLER,
Respondent.

May 8, 1986

Rehearing Denied June 24, 1986

Application for Review of the Decision of the District of Appeal—Direct Conflict of Decisions. Fourth District —Case No. 84-2188.

ADKINS, Justice.

In *Miller v. State*, 468 So.2d 1018 (Fla. 4th DCA 1985), the court vacated Miller's sentence because he was sentenced pursuant to the guidelines in effect at the time of sentencing as opposed to the guidelines in effect at the time the crime was committed. In *State v. Jackson*, 478 So.2d 1054 (Fla. 1985), we held that the trial court may sentence a defendant pursuant to the guidelines in effect at the time of sentencing.

Accordingly, the decision of the district court is quashed.

It is so ordered.

BOYD, C.J., and OVERTON and McDONALD, JJ., concur.

EHRLICH, J., concurs specially with an opinion, in which SHAW, J., concurs.

EHRLICH, Justice, concurring specially.

I concur because of this Court's decision in *State v. Jackson*, 478 So.2d 1054 (Fla. 1985), but I adhere to the views expressed in my dissent therein.

SHAW, J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 86-5344

JAMES ERNEST MILLER,
Petitioner

v.

STATE OF FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 17, 1986

PETITIONER'S

BRIEF

(5)

No. 86-5344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR PETITIONER

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
CRAIG S. BARNARD
(Counsel of Record)
Chief Assistant Public Defender
ANTHONY CALVELLO
Assistant Public Defender
GARY CALDWELL
Assistant Public Defender
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150
Counsel For Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

75pp

QUESTION PRESENTED

Whether the retroactive application of a statutory amendment to the existing Florida sentencing guidelines where the purpose and effect of the amendment was to increase sentences for sexual offenses violates the *Ex Post Facto* Clause?

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OPINIONS BELOW

The summary opinion of the Supreme Court of Florida in this cause appears as *State* v. *Miller*, 488 So.2d 820 (Fla. 1986) and is set out in the Joint Appendix (JA) at pages 18-19. The opinion of the District Court of Appeal, Fourth District of Florida, is reported as *Miller* v. *State*, 468 So.2d 1018 (Fla. 4th DCA 1985) and is set out at JA 16-17.

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on May 8, 1986, and petitioner's motion for rehearing was denied on June 24, 1986. The Petition for Writ of Certiorari was filed on August 22, 1986 with accompanying motion for leave to proceed *in forma pauperis*. Certiorari was granted on November 17, 1986. JA 20. Jurisdiction rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 10 of the Constitution of the United States which provides in pertinent part that "No State shall . . . pass any . . . ex post facto Law." It also involves section 921.001, *Florida Statutes* (1983) and Rules 3.701 and 3.988, *Florida Rules of Criminal Procedure*, both in their original form and as amended. Both versions of these provisions, because of their length, are set out as Appendix A hereto.[1]

STATEMENT OF THE CASE

A. Course Of Prior Proceedings

On May 15, 1984, an information was filed in the Seventeenth Judicial Circuit of Florida charging Petitioner,

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[1] References to the Appendix attached hereto are designated in the brief by the symbol "App. ____."

James Ernest Miller, with sexual battery while armed (Count I), burglary with an assault (Count II), and armed robbery (Count III). JA 2-3. Mr. Miller was alleged to have committed these offenses on April 25, 1984. He was tried by jury and on August 30, 1984 Mr. Miller was convicted of sexual battery with slight force, a lesser included offense under Count I; burglary with assault; and petty theft, a lesser included offense under Count III of the information. JA 6, 12. Sentencing was scheduled for October 2, 1984. Like all Florida criminal defendants whose offenses occurred after October 1, 1983, state law mandated that Mr. Miller was to be sentenced under the provisions of Florida's sentencing guidelines. A question arose at sentencing, however, because Florida had enacted an amendment to those guidelines that had become effective *after* the date of Mr. Miller's offense. The effect of this amendment, as discussed *infra*, was to increase the presumptive sentence for persons convicted of sexual offenses.

During the sentencing hearing Mr. Miller argued that the guidelines in effect at the time of the offense should be applied to determine his sentence, not the later-enacted increased guidelines. JA 6-7. Mr. Miller's counsel argued the original guidelines called for a presumptive sentence range of three and one-half to four and one-half years imprisonment. JA 7. The Assistant State Attorney requested the trial judge to sentence Mr. Miller pursuant to the amended guidelines which had not become effective until July 1, 1984. JA 8-9.

The prosecutor also filed a motion to aggravate the presumptive sentence, which contained his suggested reasons for a departure from that presumptive sentence. JA 8-10. Mr. Miller objected to those grounds and opposed

any departure sentence. JA 7-10. The prosecutor's motion to depart was denied. JA 10.

However, over defense counsel's objection, the trial judge sentenced Mr. Miller under the recently amended sentencing guidelines, which specified an increased range of between 5½ to 7 years in prison. JA 10, 12. The resulting sentence was for concurrent seven year terms in prison (with credit for time served).[2] JA 13-15. The trial judge made no finding there were clear and convincing reasons justifying a departure from the presumptive sentence.

An appeal was taken to the district court of appeal, for the Fourth District. That court, relying upon *Weaver* v. *Graham*, 450 U.S. 24 (1981), vacated Mr. Miller's sentence "because the trial court erroneously applied a stiffening of the sentencing guidelines pertaining to sex offenders, contained in the Florida Rules of Criminal Procedure, that did not become effective until after Appellant committed the instant offense. A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change." JA 16. It ordered "resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed." JA 16. The State's motion for rehearing was denied with opinion on June 5, 1985, JA 17, and it then sought discretionary review in the Florida Supreme Court.

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[2] Under Florida's guidelines, only the "primary offense"—in this case the sexual battery count—is scored to determine the sentence. Other counts are factored into that "primary offense" score. The score for the primary offense becomes the maximum sentence that can be imposed for *all* counts. This process explains the concurrent seven year sentences for the other counts of the information.

Meanwhile, the Florida Supreme Court in another case, *State* v. *Jackson*, 478 So.2d 1054 (Fla. 1985), had held that under *Dobbert* v. *Florida*, 432 U.S. 282 (1977), retroactive application of the amendments to the sentencing guidelines did not violate the *Ex Post Facto* Clause. Two justices dissented, relying on the Court's decision in *Weaver* v. *Graham*, *supra*.

The Florida Supreme Court accepted jurisdiction of this case and in a summary opinion citing its *Jackson* decision quashed the decision of the district court: "the trial court may sentence a defendant pursuant to the guidelines in effect at the time of sentencing." JA 18.

B. Material Facts: Florida's Sentencing Guidelines

Florida law bound the trial court to sentence Mr. Miller in accord with the Florida sentencing guidelines statute because his crimes occurred after the October 1, 1983 date that law became effective.[3]

Florida's move to guidelines sentencing is its response to discontent with the wide disparity it found inherent in unguided indeterminate sentencing. Its break with indeterminate sentencing, and the vast discretion it afforded, was a clean one.

The Florida Legislature created the Florida Sentencing Guidelines Commission (hereinafter "Commission") and made it responsible for the initial development of a statewide system of sentencing guidelines. § 921.001, *Fla. Stat.* (1983). There is no question the Legislature

[3] The Legislature mandated that the sentencing guidelines be applied to all non-capital felonies *committed* on or after October 1, 1983. Certain felons who committed their offense *prior* to this date were given the right to affirmatively select the sentencing guidelines. Section 921.001(4)(a), *Fla. Stat.* (1983).

intended the guidelines would set real limits on sentencing discretion. In creating the Commission the Legislature declared: "The provision of *criminal penalties and of limitations upon the application of such penalties* is a matter of predominately *substantive law* and, as such, is a matter properly addressed by the Legislature." Section 921.001(1), *Fla. Stat.* (1983) (emphasis added).[4]

The Commission was mandated to present annual recommendations for changes in the sentencing guidelines. Section 921.001(4)(b), *Fla. Stat.* (1983). The Florida Supreme Court was authorized by the Legislature to revise the sentencing guidelines, but the Legislature expressly reserved the right to approve any revisions: "However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised." § 921.001(4)(b), *Fla. Stat.* (1983).

The express purpose of the sentencing guidelines as finally enacted was to reduce disparity in sentence length and type. *See Fla. R. Crim. P.* 3.701(b) ("sentencing

[4] One reason for this declaration is that the Legislature is prohibited by the state constitution from passing matters affecting court procedures. *Fla. Const.* Art. V, § 2(a). *See Benyard* v. *Wainwright*, 322 So.2d 473, 475 (Fla. 1975) ("The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions"). Under Florida law, the power to prescribe the penalty to be imposed for commission of a crime rests with the legislature, not with the courts. *See, e.g., Dorminey* v. *State*, 314 So.2d 134, 136 (Fla. 1975). "It is well settled that the Legislature has the power to define crimes and to set punishments." *Rusaw* v. *State*, 451 So.2d 469, 470 (Fla. 1984); Art. II, Sec. 3; *Fla. Const.*

guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing . . . subjectivity . . ."). Under the previous system of indeterminate sentencing, a sentencing court was allowed the discretion to impose any sentence between the minimum and maximum established by the Legislature and there was parole eligibility, *see* Sections 947.002, 947.26, *Fla. Stat.* (1983). Generally no appeal of the sentence was allowed.

There is no longer any eligibility for parole under a guidelines sentence.[5] The defendant is to be released only when the sentence expires, and that may be shortened *only* by accumulated gain time or executive clemency. *See* Section 921.001(8), *Fla. Stat.* (1984).

The guidelines establish an objective basis for sentencing. They are divided into nine separate "offense categories." *See* Rule 3.701(c). Rule 3.701(d)(3)-(7) provides five factors to which "points" are assigned in "scoring" a given offense.[6]

After the five factors are scored, the numerical values previously assigned to each factor by the Sentencing Commission are added together to arrive at a total points score. The total points for the primary offense category[7]

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[5] In fact the parole commission was "sunsetted" (scheduled for abolition) under a law enacted in tandem with the switch to guideline sentencing. Laws of Florida, Ch. 83-13, §35.

[6] These five factors are as follows:

1. Primary offense at conviction
2. Additional offenses at conviction
3. Prior record
4. Legal status at time of offense, and
5. Victim injury.

[7] As previously mentioned, only the primary offense is scored for the guidelines sentence. The primary offense is "the most serious offense at conviction." *Fla. R. Crim. P.* 3.701(d)(3).

are compared to a chart for the offense category which contains "cells" setting forth presumptive sentencing ranges according to the total point score. An example of these charts is set out at App. ____. Each of the recommended ranges allows some discretion *within* that range, and establishes a *presumption* that the recommended sentence contained therein be employed. Rule 3.701(d)(8). Departures from the presumptive guideline sentence range are thus discouraged, to be utilized only in limited circumstances. Under *Fla. R. Crim. P.* 3.701(d)(11): "Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating reasons for the departure." The judicial overlay of the statutory requirements has evidenced an intent to ensure the vast majority of sentences stay within the presumptive bounds set by the guidelines ranges. The Florida Supreme Court in *State* v. *Mischler*, 488 So.2d 523, 525 (Fla. 1986) held "the 'clear and convincing reasons' required by the sentencing statute must be 'credible' and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." These requirements place a heavy burden on the party advocating a departure both from a persuasive and evidentiary standpoint. Under Section 921.001(5), *Fla. Stat.* (1984), any departure from the presumptive guidelines sentence range is reviewable on appeal.

The sexual battery offense for which Mr. Miller was convicted fits in the "Sexual Offenses" guidelines category. On May 8, 1984, the Florida Supreme Court approved amendments to the sentencing guidelines that

were intended to and did increase the length of imprisonment for those convicted of sexual offenses. *The Florida Bar: Amendment to Rules of Criminal Procedure*, 451 So.2d 824 (Fla. 1984). One of the principle purposes of the amendments was to "increase[] rates and lengths of incarceration for sexual offenders." *Id.* at 824 n*. The Florida Legislature approved these amendments *which went into effect on July 1, 1984.*[8] Ch. 84-328, *Laws of Florida* (1984). App. 3a-4a. The amended guidelines increased the points scored for Mr. Miller's "primary offense" by twenty-six points which translated into a two "cell" jump: an additional two years minimum presumptive sentence, and an additional two and one-half years imprisonment authorized at the top of the range.

SUMMARY OF ARGUMENT

In *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981) the Court set forth a two prong test to assess an *ex post facto* violation: (1) does the law attach legal consequence to crimes committed before the law took effect, and (2) does the law affect persons who committed those crimes in a

[8] In April of 1985 the Florida Supreme Court adopted further changes proposed by the Sentencing Guideline Commission. *The Florida Bar: Rules of Criminal Procedure* (Sentencing Guidelines 3.701, 3.988), 468 So.2d 226 (Fla. 1985). The 1985 Legislature, however, chose not to ratify those changes. Substantially the same changes and additional ones were approved by the court in *The Florida Bar: Rules of Criminal Procedure* (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla. 1985). The 1986 Legislature approved most of the changes effective October 1, 1986. Section 921.0015, *Fla. Stat.* (1986). Only the changes proposed to Form 3.988(e) were not approved by the Legislature. This indicates that the Legislature has repeatedly exercised its authority pursuant to section 921.001(4)(b), *Fla. Stat.* (1983) to disprove proposed changes in the sentencing guidelines.

disadvantageous fashion? If the answer to both questions is yes, then the law constitutes an *ex post facto* law and is void as applied to those persons.

Under the situation at bar, both prongs of the *Weaver* test are met. First, retrospective application of this amendment to the Florida sentencing guidelines would result in it being applied to persons who committed offenses prior to its effective date. Second, these consequences had a disadvantageous effect in that Mr. Miller's sentence was enhanced. Just as the statutory changes in gain-time at issue in *Weaver* disadvantaged Mr. Weaver or altered the "quantum of punishment," *id.* at 33, so too at bar, changes in the sentencing guidelines which result in a lengthier presumptive sentence disadvantaged Mr. Miller or altered the "quantum of punishment."

The test is not whether the Legislature retroactively increased the statutory maximum possible penalty, as the Florida Supreme Court holds. Rather the inquiry must focus on whether the "later standard of punishment is more onerous than the earlier." *Lindsey* v. *Washington*, 301 U.S. 397, 400 (1937); *Weaver* v. *Graham*, *supra*.

In addition, this retrospective detriment or disadvantageous effect upon Mr. Miller's sentence cannot be considered "merely procedural." Imposition of a sentence within the presumptive guidelines sentence range under Florida law embodies a substantive and substantial right. Hence the retroactive application to his detriment of this statutory amendment to the Florida sentencing guidelines law resulted in a prohibited *ex post facto* law.

ARGUMENT

THE RETROACTIVE APPLICATION TO MR. MILLER OF THE STATUTORY AMENDMENT TO THE FLORIDA SENTENCING GUIDELINES LAW TO INCREASE THE LENGTH OF INCARCERATION FOR SEXUAL OFFENSES, VIOLATES THE *EX POST FACTO* CLAUSE

A. Introduction

With the laudable goal of attaining consistency in sentencing, Florida enacted "Sentencing Guidelines" that became effective on October 1, 1983. By using objective factors which are "scored" with points, summing these points, and then comparing the point total to a standard chart for the offense category, a "presumptive" range for the sentence is determined. Though an upward or downward "departure" from the presumptive sentence could be allowed, such a departure is not discretionary and could be imposed only on narrow grounds meeting a prescribed standard of proof. In addition, parole is forever abolished, and the state and defense are given the right to appeal any "departures" from the guidelines. The points, the method of summing, the offense categories and the presumptive sentences were developed by the Sentencing Guidelines Commission and approved by the Florida Legislature and Supreme Court. There was no *ex post facto* issue with regard to these original guidelines because for an offense occurring before their effective date, sentencing under the guidelines was made optional with the defendant.

Mr. Miller's offense occurred on April 24, 1984, thereby making it mandatory that he be sentenced under the guidelines. He concomitantly lost the right to parole, but gained the right to appeal if the judge were to err in scoring or depart from the presumptive sentence. Under the guidelines in effect in April, 1984, Mr. Miller's pre-

sumptive sentence would have been three and one-half to four and one-half years incarceration. However, he was given a seven year prison sentence. The reason for that increased punishment is the issue now before the Court.

The Sentencing Guidelines Commission decided later that it wanted to *increase* the punishment for sex offenders. So, it recommended that point totals be *increased* in the "Sexual Offense" category. The more points scored, the higher the presumptive sentence will be. The Commission's recommendation to up the points for the sexual offenses category was approved by the Florida Supreme Court on May 8, 1984[9] and adopted by the legislature to be effective on July 1, 1984.[10] In approving that change the Florida court explained the effect of the amendment to the sexual offenses category as "*increas*[*ing*] the primary offense points by 20%" resulting "in both *increased* rates and length of incarceration for sexual offenders." 451 So.2d at n.* (emphasis supplied). Simply put, more people will go to prison for longer periods of time under the July, 1984 change. Here, over Mr. Miller's objections that his April offense predated the July change in the guidelines, the judge decided to follow the new guidelines. The effect, as predicted, was to boost the points scored and thus the presumptive sentence to a five and one-half to seven year range. The judge chose seven years incarceration.

The Florida appellate court said no, applying the new heftier guidelines to "stiffen[]" the sentence violates the *Ex Post Facto* Clause. The appellate court relied upon *Weaver* v. *Graham*, 450 U.S. 24 (1981) for its holding, finding that the guideline increase had "a disadvan-

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[9] *The Florida Bar: Amendment to Rules of Criminal Procedure*, 451 So.2d 824 (Fla. 1984).

[10] *Laws of Florida*, Ch. 84-328.

tageous effect" on Mr. Miller and thus could not be retrospectively applied. JA 16. But the Florida Supreme Court said yes, the new sexual offenses category could be used to increase Mr. Miller's presumptive sentence since the guidelines were "procedural."[11] The court relied upon *Dobbert* v. *Florida*, 432 U.S. 282 (1977) for its holding. The question thus put for review is whether the retroactive application of changes to sentencing guidelines with the *intended* effect of "*increas*[*ing*] . . . length of incarceration" for Mr. Miller violates the prohibition on *ex post facto* laws.

Manifestly, it does. The sentencing guidelines cannot be shunted aside as "procedural." In fact the term "guidelines" is misleading. The application of the guidelines results in a "presumptive" sentence range which defines both the type of punishment (probation, non-state jail, or prison) and its length. The sentence meted out *must* fall within this presumptive range. The only way that a sentence outside the presumptive range may be imposed is if the judge "departs" from that sentence. Departure is not discretionary. To depart, a judge must file (1) written reasons, (2) that are clear and convincing, (3) upon facts proven beyond a reasonable doubt, and (4) that are not already inherent in the offense or otherwise scored. Even then, the departure is subject to appellate review for the validity and propriety of the stated grounds. If any one of the judge's reasons is improper, the sentence is reversed unless its consideration is found harmless "beyond a reasonable doubt."

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[11] Actually, the court's opinion in this case was summary in nature, relying upon the court's prior opinion in *State* v. *Jackson*, *supra*. JA 18. It was in *Jackson* that the Florida Supreme Court's reasoning appears.

Albritton v. *State*, 476 So.2d 158, 160 (Fla. 1985) (adopting the review test of *Chapman* v. *California*, 386 U.S. 18 (1967)).

The sentencing "procedure" never changed at the relevant times of this case. The procedure for determining the sentence—scoring points for certain objective factors and summing the points to determine the sentence—stayed the same. Only the point *values* changed—and a change in point values means an increase in the sentence imposed. Thus, in reality no procedural change was brought about by the July guidelines; the only effect was substantive.[12]

With this background, no one has disputed that Mr. Miller ended up with a longer prison sentence because he was sentenced under the stiffer July guidelines rather than the original guidelines in effect at the time of his offense. Such a result is precisely what the *Ex Post Facto* Clause was intended to foreclose. In the earliest explication of the reach of the Clause,[13] Justice Chase set out four situations falling within the *ex post facto* prohibition, the second and third of which are:

> 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.

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[12] Therefore, this case does not involve the question of a guidelines sentence for a pre-guidelines offense. Whatever force an argument that the guidelines procedures were ameliorative or otherwise merely procedural might have in that situation, it is inapplicable here. In this case, the guidelines were already in mandatory effect at the time of Mr. Miller's offense, and the after-the-fact change only served to *raise* his sentence under those guidelines.

[13] The Clause applies equally to the federal and state governments. The Constitution prohibits both Congress, Art I, section 9, cl. 3 and the states from enacting *ex post facto* laws. Article I, section 10, cl. 1.

> 3d Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

Calder v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J., concurring).[14] Our understanding of the basis of the prohibition against *ex post facto* laws has changed little since that time.

The Court has consistently stricken retrospective legislative tinkering with the quantum of punishment to which a defendant is exposed for a given offense: any law passed after the commission of an offense which, "in relation to the offense, or its consequences alters the situation of a party to his disadvantage," is an invalid *ex post facto* law. *Kring* v. *Missouri*, 107 U.S. 221, 235 (1883).[15]

Thus, in *Lindsey* v. *Washington*, 301 U.S. 397 (1937), the Court invalidated application of a law enacting a mandatory minimum fifteen year sentence which replaced an indeterminate six month to fifteen year provision in effect at the time of the crime. Even though under the new

[14] The question in *Calder* v. *Bull*, *supra*, did not concern the application of the *Ex Post Facto* Clause in a criminal case; at issue instead was whether the Clause extended to civil legislation. Modern courts have applied the *ex post facto* prohibition solely to criminal enactments. *See Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594, (1952).

[15] *Kring* involved an intervening state constitutional amendment that had the effect of exposing the defendant to a first degree, rather than second degree, murder charge. The Court found the amendment had changed the defendant's "punishment." The prohibited "disadvantage" also was held to include not only exposure to greater punishment, but changes in the conditions of confinement. *See In re Medley*, 134 U.S. 160 (1890) (new law mandating convicted murderer be kept in solitary confinement until execution and that warden should set date of execution without informing prisoner violated *Ex Post Facto* Clause).

statute the defendant could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation. The Court held:

> The Constitution forbids the application of *any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer*. . . . It is for this reason that an increase in the *possible penalty* is *ex post facto*, . . . regardless of the length of the sentence actually imposed, since the *measure of punishment prescribed* by the later statute is more severe than that of the earlier.
>
> *Removal of the possibility of a sentence of less than fifteen years*, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, *operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old.*

Id. at 401-402 (emphasis added; citations omitted).[16]

B. *Dobbert* and *Weaver*

It is this time-tested fabric of constitutional jurisprudence which compelled the Court to rule for the petitioner

[16] *See also Warden* v. *Marrero*, 417 U.S. 653, 662-63, (1974) recognizing that loss of eligibility for parole is part of the "punishment" for purposes of the *Ex Post Facto* Clause); *Greenfield* v. *Scafati*, 277 F.Supp. 644 (D.Mass. 1967), *aff'd without opinion*, 390 U.S. 713 (1968) (striking a statute depriving parole violators of accumulated good time upon their return to prison, as applied to a prisoner who had been sentenced before the law went into effect, since the possible loss of good time for parole violation was in effect a potential lengthening of the sentence).

in *Weaver* v. *Graham*, 450 U.S. 24 (1981), and against him in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), and so must guide the Court here. The change at issue here is a substantive, disadvantageous one (*Weaver*) not merely an ameliorative alteration in the manner of imposing an othewise unchanged quantum of punishment (*Dobbert*). A comparison of the laws the Court considered in those two Florida cases with the one before it here makes clear the July 1984 guidelines amendments were substantive changes in the amount of punishment, both by intent and effect, and that their *post facto* application is barred by the Constitution.

Dobbert defines those retrospectively-applied law changes the Constitution will tolerate. Florida had responded to *Furman*[17] by enacting a new capital sentencing statute[18] changing in significant ways the method by which the death penalty could be imposed from that existing at the time Mr. Dobbert's crimes were committed.[19] The new statutory procedure was used to try Mr. Dobbert, and he was sentenced to death. Because the jury had recommened life, Dobbert argued the application of the new statute disadvantaged him because it permitted the trial court to override such a recommendation, when the same jury verdict would have been binding under the procedure effective at the time of the crimes.

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[17] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[18] § 921.141, *Fla. Stat.* (1973).

[19] The Court noted the changes included the bifurcated sentencing process, listing and weighing of aggravating and mitigating circumstances, requirement of written findings, the non-binding jury recommendation, and the automatic review of a death sentence as significant changes relevant to Mr. Dobbert's claim. *Dobbert*, 432 U.S. at 292. *See Proffitt* v. *Florida*, 428 U.S. 242 (1976).

The Court rejected the *ex post facto* claim, finding the changes both "ameliorative" and "procedural" which did not work to Mr. Dobbert's disadvantage, and significantly, never altered his crimes' potential punishment which throughout the years had remained the death penalty. The Court held:

> [C]rucial protection[s] demonstrate[ ] that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of *Tedder*. . . . Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute. Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law. . . .

Dobbert, 432 U.S. at 295-97. The Court also noted the speculative nature of Dobbert's claim that he would have been sentenced to life under the old statute, and rejected his reasoning the jury may have also voted for life under the old procedure. *Id.* at 295 n.7.

Relying on its earlier decision in *Beazell* v. *Ohio*, 269 U.S. 167 (1925), the Court observed that a change in the law which is procedural is not *ex post facto* even though it may work to the disadvantage of the defendant. 432 U.S. at 292. More important in finding the change in Florida law procedural, and not an *ex post facto* law, the Court explained that the premise of its holding was an absence of any change in the potential punishment from that existing at the time of the crimes:

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining *whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language from Hopt* v. *Utah*, *supra*, applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the *Ex Post Facto* Clause:

> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U.S., at 589-590.

Id. at 293-94.

The Supreme Court of Florida, relying entirely upon its decision in *State* v. *Jackson*, *supra*, reversed the decision of the Florida Fourth District Court of Appeal which had vacated Mr. Miller's sentence. JA 18-19. In *Jackson*, that court said *Dobbert* controlled which sentencing guidelines were to be used upon resentencing a probationer for his revocation of probation. The majority[20] held:

> We agree with the state that the presumptive sentence established by the guidelines does not change

[20] Six justices of the Supreme Court of Florida participated in the *State* v. *Jackson*, *supra* decision. The majority opinion, authored by Justice Overton, was concurred in by Justice Boyd, Adkins, and McDonald. Justice Enrlich files a dissenting opinion, with which Justice Shaw concurred. Subsequent to *Jackson*, the newest justice on the court, Justice Barkett, made known her agreement with Justice Ehrlich's dissent in *State* v. *Jackson*, *supra*. *See State* v. *Taylor*, 478 So.2d 294, 195 (Fla. 1986) (Barkett, J. specially concurring). Thus it is accurate to represent that the majority opinion in *Jackson* is sustained by a bare four to three vote of the Supreme Court of Florida.

> the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes *how a probation violation should be counted in determining a presumptive sentence*, is merely a procedural change, not requiring the application of the *ex post facto* doctrine. In *Dobbert* v. *Florida*, 423 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Jackson's contention that *Weaver* v. *Graham* 450 U.S. 24 (1981), should control *in these circumstances*.

Id. at 564 (emphasis supplied). The Florida Supreme Court has applied this ruling to all amendments to the sentencing guidelines and reversed the lower courts for using the guidelines which were in effect at the time the offenses were committed. *See* JA 18-19; *Colbert* v. *State*, 490 So.2d 942 (Fla. 1986); *Wilkerson* v. *State*, 494 So.2d 210 (FL. 1986)

Justice Ehrlich's *Jackson* dissent succinctly explains the flaw in the majority's reliance on *Dobbert* v. *Florida*, *supra*:

> The majority relies on *Dobbert* . . . for the principle that a change in the procedure by which a penalty is implemented does not change the "quantum of punishment." Just as the statutory change in gain time in *Weaver* altered the "quantum of punishment," . . . so too, changes in the sentencing guidelines which result in lengthier presumptive sentences alter the "quantum of punishment."
>
> I fail to see the difference between a change in gain time provisions which results in a lengthier time in prison for an offender in *Weaver*, and *a change in sentencing guidelines which potentially lengthens*

> *the time in prison* for an offender found guilty of a crime under circumstances where no clear and convincing reasons for departure exist. The majority's reasoning would be sounder if the guidelines merely provided the sentencing judge with a presumptive sentence from which he could deviate at his complete discretion. *The requirement of clear and convincing reasons for departure raises the right to be sentenced within the discretionary range to the level of a substantial right, a right which is enforceable on appeal should the appellate tribunal determine there were inadequate, clear and convincing reasons to justify departure.*

Id. at 1057-58 (emphasis supplied).[21]

Again the issue here is not whether a defendant could be sentenced under guidelines procedures for an offense committed before the effective date of guidelines sentencing,[22] nor is this a question of a procedural change in

[21] A commentator on Florida sentencing law has criticized the majority's opinion in *State* v. *Jackson*, *supra*, and lauded the dissenting opinion of Justice Ehrlich:

> Several [Florida] courts have held that in sentencing a defendant, the guidelines which were in effect at the time of the *offense* is to be used, as opposed to a change which has not taken effect until after such time. However, in *State* v. *Jackson*, the Supreme Court of Florida held that since guideline changes are "procedural," the *ex post facto* doctrine need not apply. Consequently, where the guidelines are amended subsequent to a defendant's having committed an offense, *he will be sentenced under the new ones notwithstanding the fact that he may be receiving a steeper penalty.* The dissent in *Jackson aptly points out the flaws in the majority decision.*" (footnotes omitted) (emphasis added)

L. Davidson, *Florida Criminal Sentencing Law*, 21 (1986). (footnotes omitted; emphasis supplied).

[22] Such a situation, were it involved here, *might* be more analogous to that faced in *Dobbert*. That issue will never arise in Florida, however, since the original guidelines were made optional for defendants whose offenses occurred before the guidelines became effective. *See* n.3, *supra*. Thus, the applicability of *Dobbert* to a guideline sentence for a pre-guideline offense need not be addressed here.

guidelines. Florida did not change its procedures. It increased the exposure of the length of sentence to be imposed, as intended. The *method* by which the presumptive sentence is calculated remains the same. The guidelines amendment sounds more like *Weaver*.

In *Weaver*, the defendant pled guilty to second degree murder. The crime occurred on January 31, 1976. He was sentenced to fifteen years in prison. The Florida statute, Section 944.27(1), *Fla. Stat.* (1975) at that time provided a formula for deducting gain-time credits from sentences. According to the formula, the authorities "shall grant" five, ten, and fifteen days per month off the prisoner's first and second, third and fourth, and fifth and all following years respectively. In 1978, the Florida Legislature repealed Section 944.27(1), *Fla. Stat.* (1975) and enacted a new formula for monthly gain-time deductions. The new statute said the authorities "shall grant" three, six, and nine days for the same corresponding in-prison years. Mr. Weaver sought habeas corpus relief claiming that the new statute which altered the method of prisoner gain-time computation which was enacted subsequent to the crime for which the prisoner was incarcerated affected him detrimentally and was therefore an *ex post facto* law. The Florida Supreme Court in *Weaver* v. *Wainwright*, 376 So.2d 855 (Fla. 1979) summarily denied the petition on the authority of a companion case, *Harris* v. *Wainwright*, 376 So.2d 855, 856 (Fla. 1979). The Court granted certiorari and reversed.

It held the 1979 Florida statute repealing the earlier 1975 statute and reducing the amount of "gain-time" for good conduct deducted from a prisoner's sentence violated the *ex post facto* clause when applied to a prisoner whose crime was committed before the new statute's enactment. "By definition this reduction in gain-time

accumulation lengthens the period that someone in Petitioner's position must spend in prison." 450 U.S. at 33.

The test for measuring penal legislation against the *ex post facto* provision ensures "that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. Only "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29 (citing *Lindsey* v. *Washington*, 301 U.S. at 401, and *Calder* v. *Bull*, 3 U.S. at 390).

The Court held that "a law need not impair a 'vested right' to violate the *ex post facto* prohibition," *id.* at 29, explaining:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. *Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consumated.* Thus, even if a statute merely alters penal provisions accorded by the *grace* of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id. at 30-31 (emphasis supplied). At the same time the Court cautioned that although "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment . . .'," "[a]lteration of a

substantial right, . . . is not merely procedural, even if the statute takes a seemingly procedural form." *Id.* at 29 n.12. Instead, the actual effect of the change, rather than its label, is the focus of *ex post facto* law.[23]

In *Weaver* the Florida statutory change which mandated that prisoners receive fewer days of good time lowered each prisoner's expectation of early release. Even though a prisoner *might* be released just as early by qualifying for extra days of good time, the Court did not countenance such speculation. *Id.* at 34-35. The *probability* of early release was reduced; that sufficed to violate the *Ex Post Facto* clause when applied retroactively. As the Court explained, "the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the

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[23] Thus, the Clause has also been applied to some procedural changes. *See, e.g., Thompson* v. *Utah*, 170 U.S. 343 (1898) (state law reducing number of jurors from twelve to eight); *Kring* v. *Missouri*, *supra*, (state law specifying that conviction for lesser included offense is no longer deemed an acquittal of greater offense); *United States* v. *Williams*, 475 F.2d 355 (D.C. Cir. 1973) (a provision of the D.C. Code which placed burden of affirmatively establishing an insanity defense by a preponderance of the evidence upon the defendant); *United States* v. *Henson*, 486 F.2d 1292 (D.C. Cir. 1973) (en banc) (federal law eliminating discretion of trial judge to exclude prior convictions to impeach credibility of witnesses).

Even assuming this amendment to the sentencing guidelines could be properly characterized as "procedural," the retroactive application of this amendment to the guidelines remains a violation of the *Ex Post Facto* Clause. Although a change might be called procedural, it will still run afoul of the *ex post facto* prohibition if it deprives the defendant of a substantive personal right. *Kring* v. *Missouri*, 107 U.S. at 232; *Beazell* v. *Ohio*, 269 U.S. at 171. The right secured by Florida's guidelines is substantial and a retroactive derogation of that right has substantive effect.

prohibition against *ex post facto* laws." *Id.* at 35-36 (footnote omitted).[24]

As the principle of *Lindsey* persuaded the majority to grant relief in *Weaver*, so it should here. There, a change from a discretionary maximum sentence to a mandatory sentence of the same length would change "expectations" for the worse; under the earlier law each prisoner had some positive expectation of receiving less than the maximum sentence, but under the later law he has no such expectation. 301 U.S. at 401. Even though he *might* have received the maximum sentence under the earlier Washington law, the change in *expectation* was clearly to his disadvantage, and thus was *ex post facto*. *Weaver* v. *Graham*, 450 U.S. at 32 n.17. (citing *Lindsey* v. *Washington, supra*).

The inquiry is not whether the sentence received is within the maximum statutory limits set for the offense at the time the crime was committed, but whether "the later standard [of punishment] is more onerous than the earlier." *Lindsey* v. *Washington*, 301 U.S. at 400. The *Weaver* Court explained the holdings in *Lindsey* and *Dobbert*:

> Even when the sentence is at issue, a law may be retrospective not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory. *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937). The critical question, as Florida has often acknowledged, is *whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence*. *Greene* v. *State*, 238 So.2d 296 (Fla. 1970); *Higginbotham* v. *State*, 88 Fla. 26, 31, 101 So. 233, 235 (1924); *Herberle* v. *P.R.O. Liquidating Co.*, 186 So.2d 280, 282 (Fla.App. 1966). Thus in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), we held there was no *ex post facto* violation because the challenged provisions changed the role of jury and judge in sentencing but did not add to the "quantum of punishment." Id., at 293-294.
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> *Id.* at 32 n.17 (emphasis supplied). Hence, the test fashioned in *Weaver* focuses on whether there is a retroactive "detriment" or "disadvantge to the offender" not whether the maximum possible sentence for the offense has been retrospectively increased by the Legislature.[25]

Fundamental *ex post facto* jurisprudence requires a court entertaining an *ex post facto* claim to focus on the law in effect at the time of the *offense* for which a person is being punished. *See Calder* v. *Bull*, 3 U.S. at 390; *Weaver*

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[24] Subsequent to the Court's decision in *Weaver* v. *Graham*, *supra*, lower federal courts considering alterations in gain-time allocations or calculations have found such changes to violate the *Ex Post Facto* Clause if they are detrimental and applied retrospectively. The analogy is apt. *See Knuck* v. *Wainwright*, 759 F.2d 856 (11th Cir. 1985) (retroactive recalculation of prisoner's gain time which reduced prisoner's gain time credits violated *Ex Post Facto* Clause); *Bebe* v. *Phelps*, 650 F.2d 774 (5th Cir. 1981) (retroactive application of a Louisiana statutory gain-time forfeiture provision by which prison forfeited 180 days of gain time constituted an unconstitutional *ex post facto* law); *Piper* v. *Perrin*, 560 F.Supp. 253, 255 (D.N.H. 1983) (retroactive administrative change from lump sum to monthly awarding of gain time violated the *Ex Post Facto* Clause because it was "more onerous" since it had the effect of adding nearly four months to the sentence served).

[25] Whether a retrospective state statute ameliorated or worsens conditions imposed by its predecessor is a federal question. *Weaver* v. *Graham*, 450 U.S. at 33; *Lindsey* v. *Washington*, 301 U.S. at 400. The inquiry is directed to the challenged provision, and *not* to any special circumstances that may mitigate its effect on the particular individual. *Weaver* v. *Graham*, 450 U.S. at 33; *Dobbert* v. *Florida*, 432 U.S. at 300.

v. *Graham*, 450 U.S. at 30; *Hayward* v. *United States Parole Commission*, 659 F.2d 857, 862 (8th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982). Since the prohibition against *ex post facto* laws represents the vehicle by which "the framers sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," *Weaver* v. *Graham*, 450 U.S. at 28-29, the Clause can fulfill its meaning and purpose only if a court looks to the law in effect at the time the defendant committed the offense now being punished. That law, if applied to Mr. Miller, would have clearly resulted in substantially less prison time.

C. Application Of The *Ex Post Facto* Clause To The Florida Sentencing Guidelines

The Florida sentencing guidelines are not just rules of court. Under the express terms of § 921.001(1), *Fla. Stat.* (1983), the Florida Legislature declared: "The provision of criminal penalties and of *limitations* upon the application of such penalties is a matter of *predominantly substantive law* and, as such, is a matter properly addressed by the Legislature." (emphasis supplied). *See also Benyard* v. *Wainwright*, *supra* (proscribed punishment for criminal offense constitutes substantive law). The intent of the Legislature is express. The Florida sentencing guidelines are substantive, not mere procedural rules, and have the same force and effect as if they had been statutorily enacted. Any amendments to the sentencing guidelines, such as the one at bar, Ch. 84-328, *Laws of Florida*, likewise have that same force and effect. *See* § 921.001(4)(b), *Fla. Stat.* (1983).

The *Fla.R.Crim.P.* 3.701 sentencing guidelines provide the sentence scored under the guidelines is "presumptive." Rule 3.701(b)(8). Any departure from the presumptive guideline sentence range is to be avoided. Rule 3.701(d)(11). To warrant an aggravation or mitigation of the presumptive guidelines sentence there must be clear and convincing reasons for departure stated in writing. Rule 3.701(d)(11). The facts supporting these "clear and convincing reasons" must be "credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." *State* v. *Mischler*, 488 So.2d at 525. *Accord Scurry* v. *State*, 489 So.2d 25, 28 (Fla. 1986). The Florida Supreme Court has indicated that while Rule 3.701(d)(11) "does not eliminate judicial discretion in sentencing, as respondent argues, it does seek to discourage departure from the guidelines." *Hendrix* v. *State*, 475 So.2d 1218, 1220 (Fla. 1985).

The trial judge cannot under Rule 3.701(d)(11) deviate at will from the presumptive guideline sentence. The (d)(11) test is a tough test, based on articulated standards which are seriously enforced by the Florida courts. The requirement of written "clear and convincing reasons" for departure which must be credible and proven beyond a reasonable doubt, make the right to be sentenced within the presumptive guideline range a substantive right which is enforceable on appeal. *See* § 921.001(5), *Fla. Stat.* (1983).[26]

Any amendment to the guidelines which increases a presumptive sentence, like the situation here, is undeniably "disadvantageous" to a defendant because it imposes

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[26] Section 921.001(5), *Fla. Stat.* (1983) provides: "The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924."

a greater presumptive sentence. It also takes away the requirement that the judge support what is then in effect a departure sentence, with "clear and convincing reasons." Increasing the presumptive guidelines sentence makes it much easier and more likely, therefore, to impose a longer sentence, and harder and less likely that a lesser sentence will be imposed since either upward or downward departures must meet the exacting (d)(11) standards. *See Tanner* v. *State*, 468 So.2d 505, 506 (Fla. 2d DCA 1985).

A defendant's substantive right to appeal a departure would be abrogated if a trial court could depart from a defendant's presumptive sentence through retrospective application of more onerous guidelines than those in effect when he committed the crime. A defendant's statutory right to appeal would be rendered moot if enhanced guidelines could retroactively be applied to him.[27] Conversely, the State gains the right to appeal a sentence imposed *below* the presumptive guidelines range which was formerly within the presumptive guideline range. The State would have the right to appeal this sentence on the basis that it is a "downward departure." *See* Section 924.07(9), *Fla. Stat.* (1983). This adverse affect on a defendant's right to appeal coupled with the State's gain of a right to appeal a lesser sentence are additional consequences which are disadvantageous to the defendant.

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[27] The retroactive application of the guidelines has been used to render a departure from a defendant's presumptive guideline sentence as "harmless." *See Patterson* v. *State*, 486 So.2d 74, 76 (Fla. 4th DCA 1986), "The Appellant's ten-year sentence is not a departure, ____ So.2d ____ 12 F.L.W.63 (Fla. Jan 5, 1987) sentence under the present guidelines because the maximum sentence . . . is fifteen years"); *Boston* v. *State*, 481 So.2d 550 (Fl. 2d DCA 1986).

Under the guidelines, an offender may expect a certain sentence range based on the guidelines, and has a legitimate expectation of receiving a sentence within that range unless clear and convincing reasons exist to permit the judge to depart. The offender has the right to have those clear and convincing reasons stated in writing. Thus, the average offender who commits a crime under circumstances where no clear and convincing reasons exist for departure, as is the case here,[28] has an expectation of being sentenced within the range provided by the sentencing guidelines. Absent clear and convincing reasons, proven beyond a reasonable doubt, it is impermissible for the trial judge to depart from the guidelines, in effect guaranteeing the offender committing an "average" crime a sentence within the guideline range. There is thus a substantial right to receive a sentence within that range. Any alteration in the guidelines which permits a lengthier sentence alters a substantive and substantial right to his disadvantage.

Rule 3.701(d)(11) has been meticulously enforced by both the Florida Supreme Court and the district courts of appeal. The Courts' strict application of the rigorous "clear and convincing reasons test" has resulted in the disapproval of in numerous cases numerous factors relied on by trial judges to depart from the defendant's presumptive guideline sentence.[29] The requirements of the guidelines are not mere procedural wrinkles. Such treat-

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[28] The judge in this case specifically rejected any departure from the guideline sentence and hence found no reasons to depart. JA 10.

[29] In Appendix B, we have set out by way of example only, a nonexhaustive list of more than sixty different reasons that have been held by the Florida courts to be invalid or insufficient to justify departures from the guideline sentence. App. 25a-29a.

ment by the Florida courts plainly indicates that the presumptive guideline sentence under Florida law embodies a substantive right.

Both prongs of the *Weaver* test are met. First, there is no question the amended statute was retrospective. This deprives Mr. Miller of fair notice. Second, the consequences had a disadvantageous effect by boosting Mr. Miller's presumptive sentence. Just as the statutory changes in gain time in *Weaver* v. *Graham* altered the "quantum of punishment," 450 U.S. at 33, so too the enhancements in the sentencing guidelines result in a lengthier presumptive guidelines sentence which alters the "quantum of punishment." The obvious applicability of *Weaver* to changes increasing presumptive guidelines sentences has not escaped notice of Florida judges,[30] even after the Florida Supreme Court's contrary opinion in *State* v. *Jackson*, *supra*.[31]

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[30] Three sitting Florida Supreme Court justices agree the change is unconstitutionally *ex post facto*. *See State* v. *Jackson*, 478 So.2d at 1057-58 (Ehrlich, J., dissenting). Also all but one Florida appellate court, consisting of judges who interpret guidelines cases on a daily basis, held that retroactive application of guideline changes was prohibited by the *Ex Post Facto* Clause. Prior to the *Jackson* decision, Florida's First, Second, Fourth and Fifth District Courts of Appeal were in agreement that application of the amended sentencing guidelines which increased the presumptive guideline sentence for a defendant violated the *Ex Post Facto* Clause. The Fourth District Court of Appeal in the instant case vacated Petitioner's sentence on the authority of *Weaver* v. *Graham*, *supra*. JA 16-17; *See also Moore* v. *State*, 469 So.2d 947 (Fla. 5th DCA 1985); *Walker* v. *State*, 458 So.2d 396 (Fla. 1st DCA 1984); *Hopper* v. *State*, 465 So.2d 1296 (Fla. 2d DCA 1985).

[31] Several Florida appellate judges expressed extreme discomfort with the idea that a disadvantageous guidelines amendment may be retrospectively applied. Chief Judge Schwartz of the Third District

The change in the presumptive guideline sentence clearly changed expectations for the worse; under the law at the time of his offense, Mr. Miller was guaranteed a sentence within a presumptive guideline range less than that imposed upon him. No doubt, the change in expectation is clearly to his disadvantage. As noted in *Weaver*, the Court "has previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." 450 U.S. at 32. A penal statute may be retrospective even if it alters punitive conditions outside the sentence. *See In re Medley*, *supra*. However, Mr. Miller's presumptive guideline sentence *is* the sentence or the major component of the sentence. It is a greater component of a defendant's sentence than the gain time or parole changes the Court has already held subject to the *Ex Post Facto* Clause.

Court of Appeal filed the following dissent in *Van Horn* v. *State*, 485 So.2d 1380 (Fla. 3d DCA), *aff'd*, ___ *So.2d* ___, *11 F.L.W. 623 (Fla. Dec. 4, 1986)*:

> I cannot find that a change in the guidelines rules which directly results in more than *doubling* the time the defendant must serve in prison is a mere change in procedure which, consistent with the United States Constitution, may be retroactively applied.
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> * * *
>
> I feel myself required in conscience to conclude that the length of a prison sentence which is *not* subject to parole and *which is determined by the applicable guidelines is, in the most basic sense, a substantive matter which, under the ex post facto clause, may not be increased by an amendment adopted after the crime*.

485 So.2d 1381-83 (footnotes omitted; emphasis added). *See also Wilkerson* v. *State*, 480 So.2d 213, 215-216 (Fla. 1st DCA 1985) (Barfield, J. concurring); *Brown* v. *State*, 487 So.2d 392, 394 (Fla. 1st DCA 1986) (Zehmer, J., concurring and dissenting).

In analogous areas many state and federal courts have ruled that a disadvantageous retroactive change in the penalty imposed runs afoul of *ex post facto* even though the maximum *statutory* penalty for the offense *remains unchanged*. For example, in *Shepard* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977) the defendant sentenced to prison under the Federal Youth Corrections Act, 18 U.S.C. Sec. 5010 was subsequently released on parole. After Shepard's original conviction, Congress substantially revised parole determination criteria for youthful offenders. The court found an *ex post facto* violation because the "amendments operated retroactively to Shepard's serious detriment." *Id.* at 654. The court explained that: "This result follows even if the maximum statutory penalty for the crime remains unchanged." *Id.* (citing *Lindsey* v. *Washington*, *supra*). *Accord Marshall* v. *Garrison*, 659 F.2d 440 (4th Cir. 1981); *United States* v. *Countryman*, 758 F.2d 574 (11th Cir. 1985) (failure to consider defendant for sentencing under Federal Youth Corrections Act for offense committed prior to repeal date was *ex post facto* violation); *United States* v. *Romero*, 596 F.Supp. 446 (D.N.M. 1984) (same).

In *Foster* v. *Barbour*, 462 F.Supp. 582 (W.D.N.C. 1978), a state court decision (*State* v. *Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977)), was applied retroactively to bar the defendant from being sentenced under that state's youthful offender act. The District Court found sentencing under the act would be "clearly more advantageous to petitioner than the standard life sentence." *Id.* at 588. The Court's reasoning is persuasive:

> The *ex post facto* clause and its due process analogue protect against legislative and judicial acts which "make more burdensome the punishment for a crime after its commission." . . . *Nor is the effect of Niccum merely procedural. Dobbert, supra*, at 293, 97 S.Ct. 2290. As noted above, the effect of *Niccum* was clearly unfavorable since it removed the most favorable sentencing option available to the trial court.

Id. at 588-89 (emphasis supplied; citations omitted).

The Supreme Court of Indiana in *Warner* v. *State*, 265 Ind. 262, 354 N.E. 2d 178 (1976) discussed the *ex post facto* impact of an amendment to the Indiana sentencing code after the offense which precluded the defendant from petitioning for treatment under the state's Criminal Sexual Deviancy Act. The court noted as a preliminary matter that "the State correctly does not argue that the right to petition is a matter of mere procedure." *Id.* at 182. In reasoning applicable to Mr. Miller's situation, that court said:

> Clearly, the statute here does not simply make a change in "housekeeping" rules. Appellant has lost the right to be considered for rehabilitative treatment, rather than imprisonment, on the rape conviction. That possibility of receiving an alternative form of punishment was a substantial personal right. Although there is no right to the benefit the Legislature granted in the C.S.D. statute, there is a right to be considered for that benefit in accordance with the statutory procedure. And, although the ultimate decision is extremely discretionary, Ind. Code § 35-11-3.1-17, still the Legislature may not withdraw a benefit which provided a form of punishment considered lesser or more desirable, if it was available at the time of the offense.

Id. at 184. Likewise, retroactive application of a statute that authorized six additional months in jail as a condition of probation was found to be *ex post facto* "even though the punishment received was within the statute's outer limits." *People* v. *Moon*, 125 Mich. App. 780, 337 N.W.2d 293, 296 (1983). *See also People* v. *Wells*, 138 Mich. App. 450,

360 N.W.2d 219 (1984) (removing possibility of probation violates *ex post facto*).[32] In finding the retroactive application of more rigorous statutory parole standards would result in an *ex post facto* violation, the California Supreme Court cited the Court's decisions in *Weaver* v. *Graham*, *supra*, and *Lindsey* v. *Washington*, *supra*, and framed the issue as follows:

> The critical issue before us thus becomes not whether a change in the actual date of release has been effected, *but whether the standards by which defendant's date of release is to be determined have been altered to his detriment.*

In re Stanworth, 33 Cal. 3d 176, 187 Cal. Rptr. 783, 786 (1982) (emphasis supplied).

The Florida Legislature in enacting the instant revision to the sentencing guidelines, Ch. 84-328, *Laws of Florida*, pursuant to Section 921.001(4)(b), *Fla. Stat.* (1983) specifically *intended* to alter the situation of the accused to his disadvantage. The Florida Supreme Court said so explicitly: the purpose and effect of the change was to "increase[ ] rates and length of incarceration for sexual offenders." 451 So.2d at 824 (opinion adopting amendments). A disadvantageous effect was not only the effect but the *goal* of the instant amendment. The argument that this amendment to the guidelines represents "merely a procedural change" is untenable. It wasn't even

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[32] A number of courts have held that imposition of even modest additional fines for crimes committed prior to the effective date of the amendment violates the *ex post facto* clause. *See People* v. *Clarke*, 111 A.D. 2d 11, 489 N.Y.S.2d. 1 (A.D. 1 Dept. 1985); *Wright* v. *State*, 677 S.W.2d 425, 425 (Mo. App. 1984) (A $26.00 fee assessed retroactively under state's Crime Victim Compensation Act represents "a substantive additional punishment by judgment. It may not be applied *ex post facto* to crimes committed prior to its effective date.")

intended to be so. The legislature's intent is relevant to the *ex post facto* inquiry.

Such intent was a focus in *United States* v. *Williams*, 475 F.2d 355 (D.C. Cir. 1973). The court of appeals found retroactive application of an amendment to the District of Columbia's code which placed the burden of establishing the insanity defense on the defense by a preponderance of the evidence violated the *Ex Post Facto* Clause. Judge J. Skelly Wright stated:

> Certainly the court's charge, "'in its relation to the offence, or its consequences, alter[ed] the situation of the accused to his disadvantage.'" *Thompson* v. *Utah*, 170 U.S. 343, 351, 18 S.Ct. 620, 623, 42 L.Ed. 1061 (1898), *quoting United States* v. *Hall*, 2 Wash. C.C. 366. *Moreover, Congress, in enacting Section 207(6), specifically intended to alter the situation of the accused to his disadvantage.* Congress was concerned that existing law ". . . permitt[ed] dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity. . . ." H.R.Rep.No. 91-907, 91st Cong., 1st Sess., (1970).

Id. at 357 (footnote omitted; emphasis supplied). Judge Wright further explained the effect of this congressional intent:

> In view of the express intent of Congress and the obvious effect of the statute, the Government's argument that § 207(6) provides for a mere procedural change which, applied retroactively, does not significantly alter the situation to appellant's disadvantage may be dismissed as pure advocacy. *Compare Kring* v. *Missouri*, *supra*, note 2, and *Thompson* v. *Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L. Ed. 1061 (1898) *with Beazell* v. *Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

Id. at 357 n.4.

Applying the Court's tests, the retroactive application of the changed guidelines statute to Mr. Miller has subjected him to "greater punishment," *Calder* v. *Bull*, 3 U.S. at 380; "additional punishment," *In re Medley*, 134 U.S. at 171; made more onerous the "standard of punishment," or "measure of punishment" *Lindsey* v. *Washington*, 301 U.S. at 401-402[33] or the "quantum of punishment attached to the crime," *Dobbert* v. *Florida*, 432 U.S. at 293; and imposed a "greater or more severe punishment than was prescribed by the law at the time of the . . . offense," *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905). This new provision undeniably "altered the situation to petitioner's disadvantage" and made "more onerous the punishment for crimes committed before its enactment." *Weaver* v. *Graham*, 450 U.S. at 36. It is *ex post facto*.

D. Summary

Under Florida law, the imposition of a sentence within the presumptive guidelines range represents a substan-

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[33] Justice Stone in *Lindsey*, writing for an unanimous court, stated that an increase in the possible penalty regardless of the length of the sentence actually imposed is *ex post facto*, "since the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Id.* at 401. The retroactive increase in Mr. Miller's presumptive guidelines sentence literally resulted in a more severe "measure of punishment." The mathematical values used in tallying the Florida sentencing guidelines scoresheet makes this proposition self-evident. The twenty-six points added to Mr. Miller's guidelines scoresheet under "primary offense" through the use of the amended statute results in an increase in the recommended range to 5 ½ - 7 years of incarceration. JA 12. Simple arithmetic demonstrates that Mr. Miller has been subjectd to a more severe "measure of punishment." Measured by this yardstick, Mr. Miller's *ex post facto* claim has been established with mathematical precision.

tial substantive right that is also enforceable on appeal. The retroactive amendment to the sentencing guidelines which increased Mr. Miller's presumptive guidelines sentence by definition and intent lengthens the period someone in Mr. Miller's position must spend in prison. The detriment or disadvantageous effect upon him is manifest. The retroactive application of this statutory amendment to the sentencing guidelines make more onerous the punishment for crimes committed before its enactment.

This substantive substantial right is that of the accused to receive a sentence within the presumptive guidelines sentence range. What is or is not a procedural change amounting to an *ex post facto* law depends on its effect upon the accused, not on its label. The Florida sentencing guidelines law vests Mr. Miller with substantial rights which are nullified by the retroactive application of this amendment to the sentencing guidelines. The retrospective revision of Mr. Miller's right is *ex post facto*.

CONCLUSION

Mr. Miller is entitled to be sentenced under the Florida sentencing guidelines in effect on the date of his offense. The contrary judgment of the Supreme Court of Florida must be vacated.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
CRAIG S. BARNARD
Chief Assistant Public Defender
ANTHONY CALVELLO
Assistant Public Defender
GARY CALDWELL
Assistant Public Defender
The Governmental Center
9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
Tel: (305) 820-2150
Counsel For Petitioner

APPENDIX

APPENDIX A

STATUTORY AND RULE PROVISIONS

Florida Statutes

921.001 Sentencing Commission.—

(1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority to establish sentencing criteria and to provide for the imposition of criminal penalties, has determined that it is in the best interest of the state to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, there is created a Sentencing Commission which shall be responsible for the initial development of a statewide system of sentencing guidelines. After final development of a sentencing guidelines system by the Supreme Court, the commission shall evaluate these guidelines periodically and recommend such changes on a continuing basis as are necessary to ensure certainty of punishment as well as fairness to offenders and to citizens of the state.

(3) Following the initial development of statewide sentencing guidelines by the court, the commission shall meet annually or at the call of the chairman to review sentencing practices and recommend modifications to the guidelines. In establishing or modifying the sentencing guidelines, the commission shall take into consideration current sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors. For this purpose, the commission is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits.

(4)(a) Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases. The statewide sentencing guidelines shall be implemented by October 1, 1983, unless the Legislature affirmatively delays the implementation of such guidelines prior to October 1, 1983. The guidelines shall be applied to all felonies, except capital felonies, committed on or

after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

(b) The commission shall, no later than 45 days before the convening of the Legislature in regular session each year, make a recommendation to the members of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may within 60 days revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.

(5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924.

(6) The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

CHAPTER 84-328

Committee Substitute for Committee Substitute for Senate Bill No. 775

An act relating to sentencing; providing legislative adoption and implementation of revisions to sentencing guidelines promulgated by the Florida Supreme Court in accordance with s. 921.001, F.S.; amending s. 921.001, F.S.; specifying deadlines for submission of certain documents; providing an effective date.

WHEREAS, section 921.001, Florida Statutes, authorized the development of a uniform sentencing policy in the circuit courts, and

WHEREAS, the Florida Supreme Court developed sentencing guidelines on September 8, 1983 for implementation on October 1, 1983, following recommendations of the Sentencing Guidelines Commission created for that purpose, and

WHEREAS, section 921.001, Florida Statutes, required subsequent legislative adoption and implementation of any changes to the guidelines, and

WHEREAS, on May 8, 1984, the Florida Supreme Court proposed revisions to the guidelines recommended by the Sentencing Guidelines Commission on May 4, 1984, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on May 8, 1984, are hereby adopted and implemented in accordance with s. 921.001, Florida Statutes.

Section 2. Subsections (4) and (7) of section 921.001, Florida Statutes, are amended to read:

921.001 Sentencing Commission.—

(4)(a) Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate

sentences in criminal cases. The statewide sentencing guidelines shall be implemented by October 1, 1983, unless the Legislature affirmatively delays the implementation of such guidelines prior to October 1, 1983. The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

(b) The commission shall, no later than October 1 of ~~45 days before the convening of the legislature in regular session~~ each year, make a recommendation to the members of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may within 60 days revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.

(7) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of sentencing guidelines adopted by the commission on sentencing practices, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the department, and the Parole and Probation Commission, shall estimate the impact of any proposed sentencing guidelines on future rates of incarceration and levels of prison population. Such estimates shall be based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on department records reflecting average time served for offenses covered by the proposed guidelines. Projections of impact shall be reviewed by the commission and made available to other appropriate agencies of state government, including the Legislature by December 15 of each year.

Section 3. This act shall take effect July 1, 1984 or upon becming a law, whichever occurs later.

Approved by the Governor June 24, 1984.

Filed in Office Secretary of State June 25, 1984.

RULES OF CRIMINAL PROCEDURE

Rule 3.701. Sentencing Guidelines

a. This rule is to be used in conjunction with forms 3.988(a)-(i).

b. Statement of Purpose

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.

2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.

3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1: Murder, manslaughter: Chapter 782 (except subsection 782.04(1)(a)) and subsection 316.1931(2)

Category 2: Sexual offenses: Chapters 794 and 800 and section 826.04

Category 3: Robbery: Section 812.13

Category 4: Violent personal crimes: Chapters 784 and 836 and section 843.01

Category 5: Burglary: Chapter 810 and subsection 806.13(3)

Category 6: Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832

Category 7: Drugs: Chapter 893

Category 8: Weapons: chapter 790

Category 9: All other felony offenses

d. General Rules and Definitions

1. One guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.

2. "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

3. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined on the basis of the following:

a) The offense with the highest statutory degree, in the order of life felony, first-degree felony punishable by life, first-degree, second-degree, and third-degree felonies; and

b) In the event of two (2) or more offenses of the same degree, by the lowest numerical offense category.

4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.

5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the instant offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.

1) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.

2) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.

3) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. Where the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.

4) Prior record shall include criminal traffic offenses, which shall be scored as misdemeanors.

5) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.

b) Adult record: An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision or sanction, whichever is later, to the date of the instant offense.

c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the current conviction and which would have been criminal if committed by an adult, shall be included in prior record.

6. Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

7. Victim injury shall not be scored if not a factor of an offense at conviction.

8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.

9. Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

10. Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to

either instant offense or prior arrests for which convictions have not been obtained.

12. Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.

13. Community control, a form of intensive supervised custody in the community involving restriction of the freedom of the offender, is sanction which the court may impose upon a finding that probation is an unsuitable disposition. When community control is imposed, it shall not exceed the term provided by general law.

Adopted Sept. 8, 1983 (____ So. 2d ____).

Rule 3.988. Sentencing Guidelines

These forms are to be used in conjunction with Rule 3.701.

Category 2: Sexual offenses: Chapters 794 and 800 and section 826.04 [other forms omitted]

I. Primary offense at conviction — **Points**

Degree	Number of Counts: 1	2	3	4+
Life	218	262	283	305
1st	180	216	234	252
2nd	132	158	172	185
3rd	124	149	161	174

____

II. Additional offenses at conviction

Degree	Number of Counts: 1	2	3	4+	
Life	44	53	69	97	____
1st	36	43	56	78	____
2nd	26	31	40	56	____
3rd	25	30	39	55	____
MM	5	6	8	11	____

III. Prior record

Degree	Number of Prior Convictions: 1	2	3	4+	
Life	264	330	810	1100	____
1st	158	218	486	660	____
2nd	80	189	243	330	____
3rd	26	58	81	110	____
MM	5	10	15	20	____

IV. Legal status at time of offense

Under no restrictions	0	
Under legal constraint	30	____

V. Victim injury (physical)

No contact	0	
Contact but no penetration	20	
Penetration or slight injury	40	
Death or serious injury	85	____
	Total:	▬▬▬

THE FLORIDA BAR: AMENDMENT TO RULES OF CRIMINAL PROCEDURE (3.701, 3.988—SENTENCING GUIDELINES)

No. 65216.

Supreme Court of Florida.

May 8, 1984.

PER CURIAM.

Acting under the provisions of section 921.001(4)(b), Florida Statutes(1983), the Sentencing Guidelines Commission has presented to this Court recommendations for changes in sentencing guidelines which require modification of criminal rules of procedure 3.701 and 3.988. We have reviewed the recommendations and approve the changes.* As with our original adoption of sentencing guidelines, *In re Rules of Criminal Procedure (Sentencing Guidelines)*, 439 So.2d 848 (Fla. 1983), the Committee Notes adopted herein are part of these rules.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD, EHRLICH and SHAW, J.J., concur.

ADKINS, J., dissents.

RULE 3.701. SENTENCING GUIDELINES

a. This rule is to be used in conjunction with forms 3.988(a)-(i).

b. Statement of Purpose

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.

2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.

3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1: Murder, manslaughter: Chapter 782 (except subsection 782.04(1)(a)) and subsection 316.1931(2)

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Category 3: Robbery: Section 812.13

Category 4: Violent personal crimes: Chapters 784 and 836 and section 843.01

Category 5: Burglary: Chapter 810 and subsection 806.13(3)

Category 6: Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832

Category 7: Drugs: Chapter 893

Category 8: Weapons: chapter 790

Category 9: All other felony offenses

d. General Rules and Definitions

1. One guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.

2. "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

~~3. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined on the basis of the following:~~

~~a) The offense with the highest statutory degree, in the order of life felony, first degree felony punishable by life, first degree, second degree, and third degree felonies; and~~

~~b) In the event of two (2) or more offenses of the same degree, by the lowest numerical offense category.~~

3. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined in the following manner:

a) A separate guidelines scoresheet shall be prepared scoring each offense at conviction as the "primary offense at conviction" with the other offenses at conviction scored as "additional offenses at conviction."

b) The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant to these guidelines.

4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.

5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the ~~instant~~ primary offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.

1) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.

2) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.

3) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. Where the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.

4) Prior record shall include criminal traffic iffenses, which shall be scored as misdemeanors.

5) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.

b) Adult record: An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision or sanction, whichever is later, to the date of the instant offense.

c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the ~~current conviction~~

commission of the instant offense and which would have been criminal if committed by an adult, shall be included in prior record.

6. Legal status at time of offense is defined as follows:

Offenders on parole, probation, or community control; in custody serving a sentence; escapes; fugitives who have fled to avoid prosecution or who have failed to appear for a *criminal* judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

~~7. Victim injury shall be scored if it is an element of any offenses at conviction.~~

8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.

9. Mandatory sentences: For those offenders having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline exceeds the mandatory sentence, the guideline sentence should be imposed.

10. Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

11. Departures from the guideline sentence: Departures from the ~~presumptive sentence~~ guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. ~~Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.~~ Reasons for deviating from the guidelines shall

not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

12. Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentences unless a written reason is given.

13. Community control, a form of intensive supervised custody in the community involving restriction of the freedom of the offender, is sanction which the court may impose upon a finding that probation is an unsuitable disposition. When community control is imposed, it shall not exceed the term provided by general law.

14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

Rule 3.701. Sentencing Guidelines

a. This rule is to be used in conjunction with forms 3.988(a)-(i).

b. Statement of Purpose

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.

2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.

3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or

those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1:	Murder, manslaughter: Chapter 782 (except subsection 782.04(1)(a)) and subsection 316.1931(2)
Category 2:	Sexual offenses: Chapters 794 and 800 and section 826.04
Category 3:	Robbery: Section 812.13
Category 4:	Violent personal crimes: Chapters 784 and 836 and section 843.01
Category 5:	Burglary: Chapter 810 and subsection 806.13(3)
Category 6:	Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832
Category 7:	Drugs: Chapter 893
Category 8:	Weapons: Chapter 790
Category 9:	All other felony offenses

d. General Rules and Definitions

1. One guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.

2. "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

3. "Primary offense" is defined as the most serious offense at conviction. In the case of multiple offenses, the primary offense is determined on the basis of the following:

a) The offense with the highest statutory degree, in the order of life felony, first-degree felony punishable by life, first-degree, second-degree, and third-degree felonies; and

b) In the event of two (2) or more offenses of the same degree, by the lowest numerical offense category.

4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.

5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the instant offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.

1) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.

2) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.

3) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. Where the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.

4) Prior record shall include criminal traffic offenses, which shall be scored as misdemeanors.

5) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.

b) Adult record: An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision or sanction, whichever is later, to the date of the instant offense.

c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the current conviction and which

would have been criminal if committed by an adult, shall be included in prior record.

6. Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

7. Victim injury shall not be scored if not a factor of an offense at conviction.

8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.

9. Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

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14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

Added Sept. 8, 1983 (439 So.2d 848). Amended May 8, 1984 (451 So.2d 824).

Rule 3.988 (b) Category 2: Sexual offenses

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Number of Counts Above 4			
____	x 26 =	____
____	x 21 =	____
____	x 16 =	____
____	x 16 =	____

II. Additional offenses at conviction

Degree	Number of Counts 1	2	3	4
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Number of Counts Above 4			
____	x 28 =	____
____	x 26 =	____
____	x 22 =	____
____	x 16 =	____
____	x 16 =	____
____	x 3 =	____

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Number of Priors Above 4		
____	x 290 =	____
____	x 332 =	____
____	x 174 =	____
____	x 87 =	____
____	x 29 =	____
____	x 3 =	____

IV. Legal status at time of offense

Under no restrictions	0
Under legal constraint	30

V. Victim injury (physical)

No contact	0
Contact but no penetration	20
Penetration or slight injury	40
Death or serious injury	85

[illegible]

Rule 3.988 Category 2: Sexual Offenses

Points	Recommended Range
124-169	any nonstate prison sanction
170-185	Community Control or 12-30 mos. incarceration
186-207	3 years incarceration (30-3 1/2)
208-229	4 years (3 1/2-4 1/2)
230-250	5 (4 1/2-5 1/2)
251-278	6 (5 1/2-7)
279-312	8 (7-9)
313-354	10 (9-12)
355-422	15 (12-17)
423-486	20 (17-22)
487-546	25 (22-27)
547-582	30 (27-40)
583+	Life

APPENDIX B

EXEMPLARY FLORIDA GUIDELINE CASES

The following factors have been held insufficient to authorize a departure from the presumptive guideline sentence:

1. Factors already taken into account in calculating the guidelines scoresheet, *State* v. *Mischler,* 488 So.2d 523 (Fla. 1986);

2. a reason which is prohibited by the guidelines themselves, *State* v. *Mischler, supra;*

3. an inherent component of the crime in question, *State* v. *Mischler, supra;*

4. use of alias, *Higgs* v. *State,* 455 So.2d 451 (Fla. 5th DCA 1984);

5. sporadic employment record, *Higgs* v. *State, supra;*

6. failure to appear for a sentencing hearing, *Harms* v. *State,* 454 So.2d 689 (Fla. 1st DCA 1984);

7. harsher sentence would deter others, *Williams* v. *State,* 462 So.2d 23 (Fla. 4th DCA 1984);

8. "criminal activity" which did not result in conviction, *Scurry* v. *State,* 489 So.2d 25 (FL. 1986);

9. failure to make unordered restitution to victim, *Carney* v. *State,* 458 So.2d 13 (Fla. 1st DCA 1984);

10. a white collar crime, *State* v. *Mischler, supra;*

11. an employee betrayed trust to employer, *State* v. *Mischler, supra;*

12. continuous course of bad conduct and violence, *Frank* v. *State,* 490 So.2d 190 (Fla. 2d DCA 1986);

13. defendant was found to be an habitual offender, pursuant to section 775.084, *Fla. Stat.* (1984), *Whitehead* v. *State,* ____ *So.2d* ____ *11 F.L.W. 553 (Fla. Oct. 30, 1986);*

14. disregard for the law, *Weir* v. *State,* 490 So.2d 234 (Fla. 5th DCA 1986);

15. no evidence that the defendant "induced another" to commit crime, *Wyman* v. *State*, 459 So.2d 1118 (Fla. 1st DCA 1984);

16. co-defendant received 15-year sentence, *Thomas* v. *State*, 461 So.2d 274 (Fla. 5th DCA 1985);

17. defendant's prior use of marijuana, *Bowdoin* v. *State*, 464 So.2d 596 (Fla. 4th DCA 1983);

18. speculation that defendant could have been convicted of more counts, *Lindsey* v. *State*, 453 So.2d 485 (Fla. 2d DCA 1984);

19. lying under oath in claiming an alibi, *Bowdoin* v. *State*, *supra;*

20. defendant's failure to cooperate with law enforcement officers, *Banzo* v. *State*, 464 So.2d 620 (Fla. 2d DCA 1985);

21. lack of pretense of "moral or legal justification," *Williams* v. *State*, 471 So.2d 630 (Fla. 1st DCA 1985);

22. other pending felonies, *Young* v. *State*, 455 So.2d 551 (Fla. 1st DCA 1984);

23. no evidence of premeditation since the jury convicted the defendant of the lesser included offense of second degree murder, *Scurry* v. *State*, *supra; Scurry* v. *State*, *supra;*

24. the trial court concluded that the defendant had lied or committed perjury, *Sloan* v. *State*, 472 So.2d 488 (Fla. 2d DCA 1985);

25. uncorroborated hearsay evidence, contained in the presentence investigation report, *Scott* v. *State*, 469 So.2d 865 (Fla. 1st DCA 1985);

26. psychological trauma where it was not shown that the victim sustained unusual or substantial psychological trauma, *Parson* v. *State*, 491 So. 2d 1247 (Fla. 2d DCA 1986);

27. the defendant's co-perpetrator was a minor, *Von Carter* v. *State*, 468 So.2d 276 (Fla. 1st DC 1985);

28. a co-defendant was sentenced to 5 years based on a negotiated plea, *Von Carter* v. *State*, *supra;*

29. premeditation, *Von Carter* v. *State*, *supra;*

30. prior record scored in guidelines, *Hendrix* v. *State*, 475 So.2d 1 (Fla. 1985);

31. defendant characterized as a "scofflaw," *Cummings* v. *State*, 489 So.2d 121 (Fla. 1st DCA 1986);

32. defendant's failure to confess, *Vance* v. *State*, 475 So.2d 1362 (Fla. 5th DCA 1985);

33. defendant's drug problem, *Vance* v. *State*, *supra;*

34. the public perception of selling drugs in one county was allegedly different than that in another, *Santiago* v. *State*, 478 So.2d 47 (Fla. 1985);

35. defendant's act "had a profound impact upon this small community," *Thompson* v. *State*, 478 So.2d 462 (Fla. 1st DCA 1985);

36. due to the fact that the court had no control over gain time, *Thompson* v. *State*, *supra;*

37. guidelines sentence would "denigrate" the police work, *Thompson* v. *State*, *supra;*

38. a "crimebinge" which consisted only of alleged criminal acts which were never proved, *Thompson* v. *State*, *supra;*

39. number of counts dismissed as part of plea agreement, *Cummings* v. *State*, *supra;*

40. defendant engaged in prior criminal acts, *McDowell* v. *State*, 491 So.2d 594 (Fla. 5th DCA 1986);

41. the amount of money involved in a drug delivery, *Dawkins* v. *State*, 479 So.2d 818 (Fla. 2d DCA 1981);

42. the severity of the crime in the case, *Dawkins* v. *State*, *supra;*

43. defendant was a threat to society, *Sabb* v. *State*, 479 So.2d 845 (Fla. 1st DCA 1985);

44. defendant's chemical dependency, *Young* v. *State*, 480 So.2d 712 (Fla. 5th DCA 1986);

45. to break the defendant's chain of conduct, *Montgomery* v. *State*, 489 So.2d 1225 (Fla. 5th DCA 1986);

46. the rights of the state and of the people, *Parker* v. *State*, 481 So.2d 1560 (Fla. 5th DCA 1986);

47. defendant presented a ludicrous defense, *Parker* v. *State*, *supra;*

48. youth of a rural county were unsophisticated and needed protection from the defendant, *Smith* v. *State*, 482 So.2d 469 (Fla. 5th DCA 1986);

49. economic hardship to victim, *Hankey* v. *State*, 485 So. 2d 827 (Fla. 1986);

50. "ongoing" violent criminal conduct, *Hankey* v. *State*, *supra;*

51. committing offense in high crime area, *Brown* v. *State*, 487 So.2d 1158 (Fla. 5th DCA 1986);

52. victim's family suffered in this case, *Carter* v. *State*, 485 So.2d 1292 (Fla. 4th DCA 1986);

53. killing in question was unnecessary, *Carter* v. *State*, *supra;*

54. attempting to evade capture, *Carter* v. *State*, *supra;*

55. defendant had previously refused to undergo non-compulsory psychological counseling for a prior defense, *Martinez-Diaz* v. *State*, 484 So.2d 633 (Fla. 2d DCA 1981);

56. lack of remorse, *Weir* v. *State*, *supra;*

57. recommendation of probation officer, *Scurry* v. *State*, *supra;*

58. guidelines sentence was not sufficiently severe, *Wilson* v. *State*, 490 So.2d 1360 (Fla. 5th DCA 1986);

59. defendant extremely violent, *Frank* v. *State*, 490 So.2d 190 (Fla. 2d DCA 1986);

60. defendant needed long term of supervision, *McDowell* v. *State*, *supra;*

61. speculation about possible future crimes, *Lindsey* v. *State*, *supra;*

62. defendant's prior arrests, *Thrasher* v. *State*, 477 So.2d 1083 (Fla. 1st DCA 1985);

63. fact guidelines are going to be amended in the future, *Hopper* v. *State*, 465 So.2d 1269 (Fla. 2d DCA 1985).

SOURCE:

The above list was determined by a review of reported appellate decisions concerning the application of Florida sentencing guidelines. The report is not exhaustive, but merely exemplary.

RESPONDENT'S

BRIEF

NO. 86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, FL 32399-1050

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

45 pp

QUESTION PRESENTED

WHETHER THE FLORIDA SENTENCING GUIDELINES, WHEREIN THE LEGISLATURE HAS AUTHORIZED CONTINUED JUDICIAL DISCRETION IN DEPARTING FROM THE RECOMMENDED GUIDELINES RANGE AND CONTINUING REVIEW AND REVISION OF THE GUIDELINES, ARE PROCEDURAL IN NATURE SO THE APPLICATION OF AMENDED GUIDELINES TO FELONY OFFENDERS WHO COMMITTED CRIMES PRIOR TO BUT WERE SENTENCED AFTER THEIR EFFECTIVE DATE IS NOT A VIOLATION OF THE *EX POST FACTO* CLAUSE?

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OPINIONS BELOW

The Respondent accepts the Petitioner's citations.

JURISDICTION

The Respondent accepts the Petitioner's statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement.

STATEMENT OF THE CASE

The Petitioner was charged by an information filed in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, with the felony offenses of armed sexual battery, burglary with an assault, and armed robbery (JA 2-3). These crimes were allegedly committed on April 25, 1984. A jury convicted him of the following offenses: (1) sexual battery using slight force, a second degree felony, punishable by up to fifteen years' imprisonment, § 794.011(5), Fla. Stat. (1983); (2) burglary with an assault, a felony punishable by life imprisonment, § 810.02(1), (2)(a), Fla. Stat. (1983); and (3) petit theft, a

misdemeanor, § 812.014(2)(c), Fla. Stat. (1983).

The Petitioner came before the court for sentencing on October 2, 1984. Because the crimes were committed after October 1, 1983, the effective date of Florida's sentencing guidelines, § 921.001(4)(a), Fla. Stat. (1983), there was no question that the guidelines were applicable to the Petitioner. However, the guidelines had been amended effective July 1, 1984, and at sentencing, the question arose as to whether the applicable guidelines were those in effect at the time of the commission of the crimes or the amended guidelines which were in effect at the time of sentencing.

A guidelines scoresheet had been

prepared for the sentencing hearing, using the 1984 amended guidelines (JA 12). This scoresheet scored the sexual battery offense as the "primary" offense at conviction. Points were also scored for the additional offenses at conviction (the life felony and the misdemeanor), the Petitioner's prior record of two misdemeanor convictions, and the injury to the victim. The point total of 257 placed the Petitioner in the five and one-half to seven-year recommended sentencing range.

The Petitioner's attorney argued that the 1983 guidelines should be used and if they were, the recommended sentence would be three and one-half to four and one-half years (JA 7). The prosecutor pointed out that

under the 1983 guidelines burglary would have been scored as the primary offense because the amendments changed the definition of the "primary" offense from the highest statutory degree of the crime to the offense in the category with the severest punishment (JA 8-9, compare, Fla. R. Crim. P. 3.701(d)(3) (1983) and (1984), Appendix A, ¶ 1). The prosecutor further argued that if the court decided to apply the 1983 guidelines, the court should depart upward from the recommended sentence[1] and give the Petitioner seven years (JA 9).

The trial court ruled the 1984 guidelines were applicable because

---

[1] which would have placed the Petitioner in the three and one-half to four and one-half range under burglary.

the statutory maximum penalties for criminal offenses had not been changed. The court stayed within the new guidelines, and gave the Petitioner concurrent seven-year sentences for the sexual battery and burglary counts (JA 10-11, 12-15). Since the seven-year sentence was the amount of time the prosecutor had recommended, the court did not consider whether there should be a departure from the guidelines.

The Petitioner took an appeal to the District Court of Appeal of Florida. That court held the guidelines in effect at the time of the offense rather than those at the time of sentencing should have been used. In remanding for resentencing, the court stated, "We observe that

the same sentence is possible if clear and convincing reasons for departure from the then applicable guidelines are stated in writing." (JA 16-17).

The State invoked the Florida Supreme Court's discretionary jurisdiction to review the intermediate appellate court's decision. The state Supreme Court, relying on its decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), quashed the district court's decision and held the use of the guidelines in effect at the time of sentencing was proper (JA 18-19).

This Court granted the Petitioner's petition for certiorari on November 17, 1986 (JA 20).

SUMMARY OF THE ARGUMENT

In 1983, the Florida legislature established a commission which was directed to develop a sentencing guidelines system. The commission's specific recommendations were then adopted by the Florida Supreme Court. The sentencing guidelines are designed to guide judicial sentencing discretion by reference to certain objective criteria for which points are scored to arrive at a recommended sentencing range. Departures from the recommended range, up to the statutory maximum for the offense, are permitted. The guidelines commission is an ongoing operation. It is charged with the responsibility of reviewing the guidelines and recommending

modifications. Offenders who committed crimes prior to the guidelines' effective date, October 1, 1983, were sentenced pursuant to the guidelines only if they made an affirmative election. All offenders who committed crimes after October 1, 1983, have been sentenced pursuant to the guidelines in effect on their sentencing date. In State v. Jackson, 478 So.2d 1054 (Fla. 1985), the Florida Supreme Court held that amendments to the sentencing guidelines are procedural so their application to persons who are sentenced after their effective date is not violative of the ex post facto doctrine.

The Florida Supreme Court cited as controlling authority in Jackson

this Court's decision in Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, the court held that procedural changes in the law which are on the whole, ameliorative, are not ex post facto. The amendments to the guidelines fit within this framework because trial judges retain jurisdiction to exceed the guidelines, and many reasons given for departure have been upheld on appeal. Weaver v. Graham, 450 U.S. 24 (1981), involved the entirely different issue of the reduction of statutory gain time without notice, which had been awarded on a non-discretionary basis. Here, the sentence remains discretionary and the authorizing legislation specifically notifies potential offenders that the guidelines are

subject to modification.

In numerous federal appellate decisions, it has been held that the application of new and amended parole guidelines to offenders who committed crimes before their effective date is not a violation of the ex post facto clause. The reasoning employed in these cases is equally applicable to the present situation. In both instances the parole decision/ sentencing determination is discretionary and the legislation providing for amendment of the guidelines notifies offenders that the recommended ranges are subject to change.

Thus the Florida Supreme Court's reliance on Dobbert v. Florida, supra,

was legally correct. The need for the guidelines to remain flexible and capable of modification likewise presents a sound policy reason for affirmance of the Florida Supreme Court's decision. The application of the amendments to the Petitioner was not an ex post facto violation.

ARGUMENT

THE FLORIDA SENTENCING GUIDELINES, WHEREIN THE LEGISLATURE HAS AUTHORIZED CONTINUED JUDICIAL DISCRETION IN DEPARTING FROM THE RECOMMENDED GUIDELINES RANGE AND CONTINUING REVIEW AND REVISION OF THE GUIDELINES, ARE PROCEDURAL IN NATURE; THUS THE APPLICATION OF AMENDED GUIDELINES TO FELONY OFFENDERS WHO COMMITTED CRIMES PRIOR TO BUT WERE SENTENCED AFTER THEIR EFFECTIVE DATE IS NOT A VIOLATION OF THE EX POST FACTO CLAUSE.

In 1983, the Florida legislature established a commission which was charged with developing a system of sentencing guidelines. § 921.001(1), Fla. Stat. (1983). The commission made its recommendations to the Supreme Court of Florida, which

adopted guidelines that became effective October 1, 1983. In re: Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). The guidelines are applicable to all felonies except capital crimes committed after their effective date. As to all felonies committed prior to October 1, 1983, but for which sentencing occurred afterwards, the defendants were given an opportunity to affirmatively elect guidelines sentencing. § 921.001(4)(a), Fla. Stat. (1983).

The rules of criminal procedure which pertain to sentencing guidelines, Fla. R. Crim. P. 3.701 and 3.988, set forth a series of nine categories which classify felony offenses by type. A point system

for scoring and a recommended sentencing range are contained within each category. The categories range from the specific, e.g., criminal homicide (category 1), and sexual offenses (category 2), to the general; category 9 is all other felony offenses. A single scoresheet is prepared for all offenses pending for sentencing. The category selected for scoring is determined by the primary offense, which is the most severe at conviction. Fla. R. Crim. P. 3.701(d)(1-3).

Once a category has been selected, the offender is scored points based upon the primary offense at conviction, any additional offenses at conviction, his prior criminal record, his legal status

at the time of the offense, and victim injury. The points are tallied to arrive at a recommended sentencing range. If the trial judge determines the offender should be sentenced outside the range--either above it up to the statutory maximum penalty or below--the reasons for departure must be set forth in writing. Fla. R. Crim. P. 3.701(d)(11) (1983); § 921.001(5) and (6) (1983). A departure sentence may be appealed.

In the enabling legislation which authorized the development of sentencing guidelines, as well as the rules of procedure establishing them, there are three salient factors which are material to the Petitioner's ex post facto claim. First, offenders whose crimes were committed prior to

the guidelines' October 1, 1983, effective date were given the option to elect guidelines sentencing. Thereby, the legislature recognized that since persons sentenced under the guidelines were ineligible for parole § 921.001(8), Fla. Stat. (1983), in compliance with Weaver v. Graham, 450 U.S. 24 (1981), an election by defendants who committed crimes when parole was still possible was required. The Petitioner does not fall within this group because his crimes were committed in 1984.

Second, the Florida sentencing guidelines state clearly their purpose is to guide, not eliminate, judicial discretion in sentencing. The statement of purpose which prefaces the guidelines states: "The purpose of

sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the decision-making process." Fla. R. Crim. P. 3.701(b) (1983). Subsection (b)(6) of the rule reiterates this point: ". . . the sentencing guidelines are designed to aid the judge in the sentencing decision and not intended to usurp judicial discretion . . ."

The history leading up to the enactment of the guidelines[2] confirms the view that the guidelines were intended to be discretionary. Nationally, efforts have been made to

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[2]For a general overview of this topic, see Note, an Examination of Issues in the Florida Sentencing Guidelines, 8 Nova Law Journal (1984).

re-evaluate the sentencing process and replace indeterminate sentencing. (See, generally, Symposium Issue: Criminal Sentencing in Transition, 68 Judicature (1984)). The unifying concern in the efforts to bring about change was the belief that sentencing reform based upon more explicit standards would structure the discretion of officials and reduce disparity. Martin, Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania, 29 Villanova Law Review 21, 26-27 (1983-1984). In response to criticism that guidelines amount to "fixed" sentencing, advocates have promised, "The guidelines criteria or rules are no more

designed to erase individual judgment than are rules or criteria for awarding damages or costs in particular cases. The point is simply to have the individual case decided on legal grounds of general application." Frankel and Orland, Sentencing Commissions and Guidelines, 73 Georgetown Law Journal 225, 231-232 (1984).

Florida's former state Supreme Court Chief Justice, a leading proponent of guidelines, commented in 1980:

> Use of sentencing guidelines by trial judges would be mandatory to the extent that the sentencing norm for a particular type of defendant, convicted of a particular offense, would be consulted to decide the sentence to be imposed. Since the purpose of guidelines, however, is to lend some

> structure to the sentencing decision while retaining judicial discretion the trial judges may at times impose sentences other than those recommended by the guidelines.
>
> . . .
>
> Sentencing guidelines are not intended to address all cases brought before the bench. It is virtually impossible to develop a system of guidelines that would take into account the myriad aggravating or mitigating factors that could appropriately be considered. Judicial discretion is indispensable for cases where the need exists to sentence outside of the recommended range.

Sundberg, Plante and Palmer, A Proposal for Sentencing Reform in Florida, 8 Florida State Univ. Law Review, 1, 11, 17 (1980).

In light of the fact that the guidelines are discretionary while the maximum statutory penalties for

felony offenses remain unaltered, the guidelines are procedural and ameliorative in nature. The amendments to the guidelines and their application to the Petitioner was not violative of the ex post facto clause. Dobbert v. Florida, 432 U.S. 282 (1977).

Third, the legislature has clearly stated that the guidelines should be flexible. They are to be revised and amended so as to benefit from experience. Initially, the statute provided for the sentencing guidelines commission to meet annually or at the call of the chairman to review sentencing practices and recommend modifications to the guidelines. § 921.001(3), Fla. Stat. (1983). The present statute requires

that the commission shall, no later than October 1 of each year, make such recommendations. § 921.001(4)(b), Fla. Stat. (Supp. 1986). Any recommended changes are submitted to the Florida Supreme Court, and upon its approval, become effective after adoption by the legislature. § 921.001(4)(b), Fla. Stat. (1983).

Changes to the guidelines have been adopted by the Florida Supreme Court and approved by the legislature twice, and a proposal for further changes is pending in the Florida Supreme Court at this time. The first series of amendments, The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines), 451 So.2d 824 (Fla. 1984), was approved by the

legislature and became effective July 1, 1984. Ch. 84-328 § 1, Laws of Florida. It is these guidelines that were used at the Petitioner's October 2, 1984, sentencing. [In its opinion adopting the 1984 amendments, the Florida Supreme Court summarized the changes and reasons therefor. This summary is attached as Respondent's Appendix A.] A second set of guidelines amendments, The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla. 1985), was approved by the legislature and became effective October 1, 1986. § 921.0015, Fla. Stat. (Supp. 1986).

Just as the guidelines were intended to be discretionary, proponents of guidelines designed

them to be subject to continuing review and revision. For example, in Minnesota, the sentencing guidelines have been modified seven times for the purposes of incorporating new crimes that the legislature creates, clarifying language as cases arise that the guidelines do not cover, and increasing the recommended sentences. Knapp, Johnson, Falvey and Tomljanovich, Minnesota Sentencing Guidelines, 4 Law and Inequality 51, 56 (1986). Discussing Minnesota's experience with the guidelines, commentators have stated,

> A signal virtue of the commission device is that it is designed to live steadily with its subject, to learn from experience, to seek improvements, to adapt to changing conditions . . . Through the commission

> device the whole gamut of sentencing practices, in the context of the entire criminal process, has become the subject of continuous, thoughtful, coherent attention.

Frankel and Orland, Sentencing Commissions and Guidelines, 73 Georgetown Law Journal 225 (1984).

In this regard, the proposed federal sentencing guidelines which are presently under consideration likewise contemplate that they will subject to periodic revision. U.S. Sentencing Commission Guidelines Preliminary Draft, 40 Cr.L. 3001 (1986).

The facts that there is general agreement that guidelines should be periodically revised and that the Florida statute which created the guidelines commission on its face provides for continuous review and

recommendation of changes to the guidelines therefore served as fair warning to individuals committing crimes after October 1, 1983, that they would be sentenced pursuant to the guidelines in effect on their sentencing date.

Nevertheless, the Petitioner contends the use of the 1984 amended guidelines at his sentencing violated the ex post facto clause of the United States Constitution. He asserts that because his crimes were committed on April 25, 1984, prior to the July 1, 1984, effective date of the amendments, the original 1983 guidelines should have been used to calculate his recommended sentence on the day of sentencing, October 2, 1984.

The State maintains the

Petitioner's claim is without merit. The sentencing guidelines are procedural rules designed to guide trial courts' sentencing discretion. The guidelines operate only to provide a framework for the exercise of discretion, and as a whole, they are ameliorative because they reduce sentence disparity. Departures from the recommended range are permitted, provided that clear and convincing reasons are articulated by the trial judge in writing. The changes do not deprive defendants, who are on notice that amendments are likely to occur, of any pre-existing legal right nor enhance the punishment imposed, which remains the statutory maximum set for the offense by the legislature.

In State v. Jackson, .

478 So.2d 1054, 1056 (Fla. 1985), the Florida Supreme Court, relying on Dobbert v. Florida, 432 U.S. 282 (1977), concluded that amendments to the sentencing guidelines are procedural and thus, their application to persons who are sentenced after their effective date is not violative of the ex post facto doctrine. Since Jackson was decided, the court has consistently applied it.[3] In recent opinions, the court has held that all sentencing guidelines amendments are procedural in nature so the guidelines as most recently amended are to be applied at the time of sentencing without regard to the ex post facto

[3] Jackson was the case relied on by the state Supreme Court in its decision in the instant case (JA 18-19).

doctrine. Wilkerson v. State, 494 So.2d 210 (Fla. 1986); Van Horn v. State, 11 FLW 623 (Fla. Dec. 4, 1986); Patterson v. State, 12 FLW 63 (Fla. Jan. 5, 1987).[4]

The Florida Supreme Court's rejection of the Petitioner's ex post facto claim is in accord with the precedent of this Court. In a number of cases, this Court has held that the ex post facto clause is not applicable to procedural changes in criminal laws which do not affect substantial rights, even though they might in some way operate to a person's disadvantage. In Hopt v. People of Utah, 110 U.S. 574 (1884), it was

[4] These cited cases--Wilkerson, Van Horn and Patterson--were decided by a unanimous court.

held a statute which enlarged the class of persons competent to testify in a criminal case was not an ex post facto law in its application to a criminal prosecution for a crime committed prior to its passage. Likewise, in Thompson v. Missouri, 171 U.S. 380 (1898), and Beazell v. Ohio, 269 U.S. 167 (1925), the court held that changes in rules regarding the admissibility of evidence were not ex post facto.

The controlling authority from this Court which was the case relied on by the Florida Supreme Court to reject the ex post facto challenge in State v. Jackson, supra, is Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, at the time the defendant committed the crime of first degree

murder, the determination of whether the sentence for that offense would be death or life imprisonment was left to the absolute discretion of the jury. At the time he was tried, the issue was decided based upon certain objective criteria (aggravating and mitigating circumstances), that were subsequently promulgated by the legislature. Moreover, the jury, instead of authoritatively deciding the sentence as had previously been the case, returned a recommendation to the trial judge and the latter actually imposed the sentence. Dobbert appealed his death sentence, contending it was a violation of the ex post facto clause, particularly since his jury had recommended life imprisonment. This Court, after

pointing out that the ex post facto clause ". . . was intended to secure substantial personal rights against arbitrary and oppressive legislation [citation omitted] and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance . . ." Id., 432 U.S. at 293, held the change in the capital sentencing statute did not result in an ex post facto change in the law. The court reviewed the changes and concluded they were procedural and on the whole ameliorative, because they were designed to provide more safeguards to the defendant, as required by Furman v. Georgia, 408 U.S. 238 (1972). Dobbert at 432 U.S. 294-296.

Like the capital sentencing

statute reviewed in Dobbert, the guidelines at issue here merely guide and channel discretion. The amendments are procedural refinements, the need for which was expressed in the initial legislation. § 921.001(3), Fla. Stat. (1983). Under both the original 1983 guidelines and the 1984 amendments, the trial judge retained discretion to sentence the Petitioner up to the statutory maximum penalty for his offenses. The Petitioner can only speculate that he may have received a lesser sentence had he been sentenced pursuant to the 1983 guidelines. The seven-year concurrent sentences the Petitioner received were within the recommended range as calculated under the 1984 amendments (JA 12).

The 1984 amendments, inter alia, altered the method of deciding, in the case of multiple offenses, which one is the "primary" offense, which in turn determines the appropriate category for preparation of the guidelines scoresheet. Initially, the primary offense was the one with the highest statutory degree. Fla. R. Crim. P. 3.701(d)(3)(a) (1983). Pursuant to the 1984 amendments, the primary offense became the one which, when scored on the guidelines scoresheet, results in the most severe sentence range. Fla. R. Crim. P. 3.701(d)(3) (1984). The amendment was made in order to avoid manipulation among the categories. (Respondent's Appendix A, ¶ 1). Thus, using the 1984 amendments

resulted in the second degree felony, sexual battery, being scored as the primary offense rather than the felony punishable by life, burglary with an assault.

It is entirely possible, and even likely, that had the trial judge decided to apply the 1983 guidelines, he would have granted the prosecutor's request to "aggravate" the sentence by departing and imposing seven years (JA 9).[5] The trial court simply did not reach the departure issue because once it ruled the 1984 guidelines were applicable, the recommended sentence was seven years' imprisonment.

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[5]At least one of the reasons suggested by the State as a ground for departure (R 22-23), have been upheld as valid: hardship to the victim's family. Moreira v. State, 12 FLW 192 (Fla. 3rd DCA Jan. 6, 1987).

Moreover, Dobbert requires that the guidelines be viewed as a whole, and not as to their effect on a particular offender. The legislation was remedial and therefore, not ex post facto, because it was designed to reduce arbitrary and capricious sentencing by guiding discretion.

Weaver v. Graham, 450 U.S. 24 (1981), the case on which the Petitioner chiefly relies, involved an entirely different issue: the reduction of statutory gain time which had the effect of extending the inmate's date of release. The statutory gain time at issue in Weaver was non-discretionary and awarded so long as the inmate did not violate any rules or regulations while incarcerated. Id., 450 U.S. at 35.

This Court determined the statutory change attached legal consequences to a crime committed before the law took effect and therefore was ex post facto because it changed the "quantum of punishment" to the prisoner's detriment.

In the instant case, the Petitioner, like all other defendants who committed felony offenses after October 1, 1983, the guidelines' original effective date, was on notice that the guidelines would be used in calculating his recommended sentence, they were subject to amendment, and the recommended range could be exceeded up to the statutory maximum penalties for the crimes he committed, which remained unchanged. The purpose of the ex post facto

clause is to ensure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. Weaver at 450 U.S. 28-29. The Petitioner had that fair warning.

The Petitioner cannot avoid the fact that the guidelines are discretionary and departures from the recommended guidelines sentences are permitted. See, e.g., the Committee Note to Rule 3.701(d)11, at 451 So.2d 828: "Other factors, consistent and not in conflict with the statement of purpose, may be considered and utilized by the sentencing judge." Therefore, the amendments did not alter the quantum of punishment and were not disadvantageous. In Appendix B of his brief, the

Petitioner cites a series of Florida appellate decisions which have disapproved certain reasons given by trial judges. However, the Florida Supreme Court has made it clear that there are valid reasons which will support departures, and the reviewing court's function is to determine if the trial court abused its discretion. Lerma v. State, 497 So.2d 736 (Fla. 1986).

For example, the courts have approved as valid grounds for departure such varying reasons as:

(1) an highly extraordinary and extreme incident of aggravated battery, Vanover v. State, 11 FLW 614 (Fla. Nov. 26, 1986);

(2) a defendant's record as a juvenile which was not scored due to

its remoteness in time, Weems v. State, 469 So.2d 128 (Fla. 1985);

(3) premeditation, where not an inherent component of the crime, Lerma v. State, supra;

(4) a defendant's pattern of committing new crimes shortly after release from incarceration, Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Bass v. State, 496 So.2d 880 (Fla. 2nd DCA 1986); White v. State, 481 So.2d 993 (Fla. 5th DCA 1986);

(5) an escalating course of criminal conduct, Keys v. State, 12 FLW 56 (Fla. Dec. 24, 1986); Pittman v. State, 492 So.2d 741 (Fla. 1st DCA 1986); DeGroat v. State, 489 So.2d 1163 (Fla. 5th DCA 1986); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984);

(6) psychological trauma to the victim (where not a component of the crime), Green v. State, 491 So.2d 1279 (Fla. 2nd DCA 1976); Cortez v. State, 497 So.2d 671 (Fla. 2nd DCA 1986); Grant v. State, 12 FLW 236 (Fla. 4th DCA Jan. 7, 1987);

(7) victim particularly vulnerable, Stewart v. State, 489 So.2d 176 (Fla. 1st DCA 1986); Grant v. State, supra; Hadley v. State, 488 So.2d 162 (Fla. 1st DCA 1986);

(8) great risk to the safety of others during the commission of the crime, Webster v. State, 12 FLW 107 (Fla. 1st DCA, Dec. 23, 1986); Bailey v. State, 485 So.2d 482 (Fla. 3rd DCA 1986);

(9) severe trauma to the family of the victim, Moreira v. State,

12 FLW 192 (Fla. 3rd DCA Jan. 6, 1987);

(10) an attempt by the defendant to blame the victim for his acts (in a lewd assault on a child), Peake v. State, 490 So.2d 1325 (Fla. 1st DCA 1986);

(11) a breach of the trust placed in the defendant by the victim, Hankey v. State, 485 So.2d 827 (Fla. 1986); Steiner v. State, 469 So.2d 179 (Fla. 3rd DCA), rev. denied, 479 So.2d 1181 (Fla. 1985);

(12) a "crime binge," i.e., a series of crimes committed within a short time period, Rousseau v. State, 496 So.2d 830 (Fla. 1st DCA 1986); Mathis v. State, 11 FLW 2602 (Fla. 1st DCA Dec. 10, 1986);

(13) the victim was a uniformed police officer, State v. Baker,

483 So.2d 423 (Fla. 1986); Williams v. State, 492 So.2d 1171 (Fla. 5th DCA 1986);

(14) the defendant had an additional conviction which was not scored because it occurred after the commission of the primary offense, Pugh v. State, 12 FLW 138 (Fla. 1st DCA, Dec. 23, 1986); Wright v. State, 491 So.2d 283 (Fla. 2nd DCA 1986);

(15) the defendant expressed contempt for the judicial system, Fry v. State, 497 So.2d 964 (Fla. 1st DCA 1986);

(16) a large quantity of drugs, greater than the minimal amount necessary to commit a narcotics offense, Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986); Mullen v. State, 483 So.2d 754

(Fla. 5th DCA 1986);

(17) the defendant threatened the victim and witnesses in his case, Walker v. State, 496 So.2d 220 (Fla. 3rd DCA 1986);

(18) the defendant deliberately destroyed evidence, Fernandez v. State, 482 So.2d 541 (Fla. 3rd DCA 1986);

(19) the burglary of an occupied dwelling,[6] Brooks v. State, 487 So.2d 68 (Fla. 1st DCA 1986);

(20) the cold blooded manner in which an offense was carried out, Davis v. State, 489 So.2d 754 (Fla. 1st DCA 1986);

(21) the defendant used his employees to carry out a well

[6] A factor which would constitute an additional reason for departure in this case.

organized scheme to defraud, Gitman v. State, 482 So.2d 367 (Fla. 4th DCA 1985);

(22) the presence of drugs in a house where young children lived posing a danger to them, Cortez v. State, 488 So.2d 163 (Fla. 1st DCA 1986);

(23) a violation of probation, State v. Pentatude, 12 FLW 29 (Fla. Jan. 5, 1987);

(24) excessive brutality, Harvey v. State, 497 So.2d 996 (Fla. 5th DCA 1986); and,

(25) a negotiated plea agreement, Lawson v. State, 497 So.2d 288 (Fla. 1st DCA 1986).

The foregoing cases demonstrate that the intent expressed in the statute and the rules that the

guidelines be used to guide, not abrogate, judicial discretion (as outlined earlier in this brief ante, at pages 18-23), is indeed a reality. Consequently, Weaver v. Graham, supra, which involved a non-discretionary entitlement as a matter of law, as well as this Court's previous decision in Lindsey v. Washington, 301 U.S. 397 (1936), wherein a maximum potential sentence became mandatory and was held to be ex post facto, are inapplicable to the present case. The Florida Supreme Court correctly relied on Dobbert v. Florida, supra.

Counsel for Petitioner have cited the decision in Hayward v. United States Parole Commission, 659 F.2d 857, 862 (8th Cir. 1981),

cert. denied, 456 U.S. 935 (1982). We are pleased counsel has recognized the federal decisions involving the application of parole guidelines are an appropriate analogous area. Like sentencing guidelines, the federal parole guidelines have been specifically designed to remove arbitrariness and capriciousness from the decision-making process. Nine Circuit Courts of Appeal and one Supreme Court Justice have held that retrospective application of the federal parole guidelines does not offend the ex post facto clause. See, cases collected in Yamamoto v. U.S. Parole Commission, 794 F.2d 1295, 1297 f.n. 3 (8th Cir. 1986).

In Portley v. Grossman, 444 U.S. 1311 (Rehnquist, Circuit

Justice, 1980), it was stated that the parole guidelines were not ex post facto because they merely provide a framework for the commission's exercise of its statutory discretion; thus, the defendant is not deprived of a pre-existing right nor is the punishment imposed enhanced.

In Yamamoto v. U.S. Parole Commission, 794 F.2d 1295 (8th Cir. 1986), the court held the application of the 1983 amended parole guidelines to decide a prisoner's release date, which resulted in a determination that he should serve eighty-four months rather than the forty to fifty-two months that would have been set under the 1979 guidelines in effect at the time he committed his crime, was not ex post facto. The

court reasoned that although the parole guidelines were designed to reduce disparity, Congress clearly intended that a determination of parole eligibility would remain discretionary with the parole commission. Yamamoto at 1299. The court also observed that both the statute authorizing the guidelines and the parole commission regulations recognize that the guidelines should be periodically reviewed and revised so, "offenders are thus given fair warning that the guidelines governing parole determinations are subject to change." Id. at 1300.

The fair warning aspect also was noted in the Seventh Circuit's decision in Inglese v. U.S. Parole Commission, 768 F.2d 932 (7th Cir.

1985). The lack of fair notice which concerned this Court in Weaver v. Graham, 450 U.S. 24, 30 (1981), was found not to be present in the parole guidelines: "The 1973 guidelines reserved the commission's right to revise the guidelines, thereby giving Petitioner fair warning when he was sentenced that the guidelines under which his parole release date would be determined would be subject to change." Inglese at 768 F.2d 936. The Eleventh Circuit, in Dufresne v. Baer, 744 F.2d 1543 (11th Cir. 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 61 (1985), likewise pointed out the fact that a prisoner was on notice at the time he committed his crime that the guidelines were subject to revision:

> Petitioner's claim that the commission could not amend the guidelines retrospectively if the amendment would produce a longer term of incarceration implies that he was not on notice, when he committed his crime, that such an amendment could occur. In truth, petitioner was on notice that such an amendment might well occur. The commission had a statutory duty to monitor and periodically update its guidelines and to apply current guidelines to crimes previously committed.

Dufresne at 744 F.2d 1548.

The facts that the United States Parole Commission may continue to exercise its discretion in setting release dates, and that the parole guidelines are simply guidelines, have also convinced the federal courts that they are not ex post facto. Rifai v. U.S. Parole Commission, 586 F.2d 695 (9th Cir.

1978); DiNapoli v. Northeast Regional Parole Commission, 764 F.2d 143 (2nd Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 568 (1985). Thus, even though the parole guidelines are followed 85 percent of the time, since the commission has a congressional mandate expressed in the statute to continue to exercise discretion, how often it is exercised is immaterial. Inglese v. U.S. Parole Commission, 768 F.2d 932, 937 (7th Cir. 1985); Wallace v. Christensen, 802 F.2d 1539, 1553-1554 (9th Cir. 1986) (en banc).

The conclusion that application of new or amended guidelines is not ex post facto, has also been reached by federal courts reviewing state parole guidelines systems. In

Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984), the court found the Florida parole guidelines clarified the manner in which commission discretion was exercised, by reference to certain objective criteria, but did not alter the fact that the parole decision involved the use of discretion. The court distinguished Weaver v. Graham, 450 U.S. 24 (1981), because in Weaver the prisoner had a mandatory statutory entitlement to a certain amount of automatically calculated gain time, and no discretion was involved in awarding the gain time. The continuing existence of discretion in the parole system thus permits application of parole guidelines as of their effective date, regardless of the date the offense was committed.

Paschal v. Wainwright, supra; Johnson v. Wainwright, 772 F.2d 826 (11th Cir. 1985); Damiano v. Florida Parole and Probation Commission, 785 F.2d 929 (11th Cir. 1986); Jonas v. Wainwright, 779 F.2d 1576 (11th Cir. 1976); see also, Heirens v. Mizell, 729 F.2d 449, 458-459 (7th Cir.), cert. denied, 105 S.Ct. 147 (1984).

The federal parole guidelines decisions cited above are strongly persuasive in the instant case. The Florida sentencing guidelines concept had its genesis in the federal parole guidelines system. Sundberg, Plante and Palmer, A Proposal for Sentencing Reform in Florida, 8 Florida State Univ. Law Review 1 (1980). The two factors found by the federal courts

in the parole cases as the basis for holding there was no ex post facto violation, fair notice to potential offenders that the guidelines were subject to revision and the continued existence of commission discretion, are present in the Florida sentencing guidelines scheme (ante, pages 18-28).

The decision in Shepard v. Taylor, 556 F.2d 648 (2nd Cir. 1977), cited by the Petitioner as supporting his position, is clearly distinguishable. In Shepard, the parole commission's guidelines incorporated facts that were barred from consideration by the Federal Youth Corrections Act under which the Petitioner was sentenced. It was this unique circumstance that resulted in a finding the guidelines were ex post facto to the petitioner

in that case. Indeed, in Shepard, the court was careful to state:

> We should like to emphasize the narrow scope of our holding . . . the guidelines do not constitute impermissible ex post facto laws when applied to an adult offender since, in such an instance, they merely clarify the exercise of administrative discretion without altering any existing considerations for parole release . . . The constitutional violation we find in the instant case results from the application to a person . . . of new and onerous conditions that were forbidden when he was originally sentenced in 1972.

Shepard, at 556 U.S. 654. Shepard, and the other cases cited by the

Petitioner on this subject,[7] were decisions grounded in the special considerations of the Youth Corrections Act. The federal parole guidelines opinions involving adult offenders, cited by the Respondent, present the more apt analogy in this case. The alterations in the Youth Corrections Act found to be ex post facto are more like the change from the indeterminate sentence with parole system to guidelines sentencing without parole which occurred in Florida on October 1, 1983. Florida

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[7] Marshall v. Garrison, 659 F.2d 440 (4th Cir. 1981); United States v. Countryman, 758 F.2d 574 (11th Cir. 1985); United States v. Romero, 596 F.Supp. 446 (D.N.M. 1984).

recognized that offenders prior to that date should be given the opportunity to make an affirmative election of guidelines sentencing, since if they chose the guidelines, their parole eligibility would be removed. § 921.001(4)(a), Fla. Stat. (1983). After the guidelines' effective date, the recommended range could be exceeded by sentencing judges in the exercise of their discretion and offenders were on notice that the guidelines were subject to revision. The guidelines as amended did not remove certain sentencing options or permit consideration of matters previously barred as was the situation in

Shepard.[8] See, Richards v. Crawford, 437 F.Supp. 453, 456 (D. Conn. 1977).

The amendments to the Florida sentencing guidelines were not, as was the case in United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), specifically intended to alter the situation of an accused to his

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[8]This distinguishes the cases cited by the Petitioner where ex post facto violations were found because favorable sentencing options had been removed. Foster v. Barbour, 462 F. Supp. 582 (W.D. N.C. 1978) [Youthful Offender Act held inapplicable to persons convicted of murder]; Warner v. State, 354 N.E.2d 178 (Ind. 1976) [statute amended so persons convicted of forcible rape were ineligible for sexual deviant treatment]; People v. Wells, 360 N.W.2d 219 (Mich. App. 1984) [persons convicted of first degree criminal sexual conduct declared ineligible for probation]; People v. Moon, 125 Mich. App. 773, 337 N.W.2d 293 (1983) [jail time to be spent as a condition of probation increased from six months to one year].

disadvantage.[9] In ex post facto analysis, the new and old statutes must be examined in toto to determine if the new law may be fairly characterized as more onerous than the old. The inquiry looks to the

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[9] In Williams, the law was amended to place the burden on a criminal defendant claiming insanity to establish it by a preponderance of the evidence; whereas previously once the defense raised a claim of insanity, the government was required to prove sanity beyond a reasonable doubt. Also, in Williams the court found no evidence of legislative intent to apply the change to those whose offenses were committed previously. By contrast, the statute authorizing the sentencing guidelines system specifically directs the commission, when modifying the guidelines, to consider the capacities of correctional institutions. § 921.001(3), Fla. Stat. (1983). This demonstrates a legislative intent that the guidelines amendments be applicable to all offenders sentenced after their effective date, since one of the concerns is to control the prison population.

challenged provisions and not to the specific circumstances of the individual. Raimondo v. Belletire, 789 F.2d 492 (7th Cir. 1986); Chatman v. Marquez, 754 F.2d 1531 (9th Cir.), cert. denied, 106 S.Ct. 124 (1985); Dobbert v. Florida, 432 U.S. 282, 294 (1977); Weaver v. Graham, 450 U.S. 24, at 38 (Rehnquist, J., concurring) (1981). A review of the Florida Supreme Court's discussion of the amendments and the reasons therefor (see Respondent's Appendix A) clearly demonstrate that they are procedural in nature. They are refinements in the guidelines, an attempt to better guide judicial discretion, and their overall effect is ameliorative in accomplishing that goal. Thus, the guidelines as amended do not meet any

of the standard criteria of an ex post facto law: they do not make criminal an act innocent when done, increase the punishment, alter the rules of evidence, or deprive the Petitioner of a substantial right he had at the time of the commission of the offense. Mallett v. North Carolina, 181 U.S. 589 (1901); Nilson Van and Storage v. Marsh, 755 F.2d 362 (4th Cir. 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 65 (1985).

Aside from the fact that the Florida Supreme Court's decision permitting application of the amended sentencing guidelines as of their effective date stands on firm legal ground, there are sound policy considerations favoring affirmance. The sentencing guidelines embody an

innovative and substantial change from the previous system of indeterminate sentencing with parole. As with any new system, there has been and will continue to be a perceived need to modify the guidelines so as to benefit from the State's experience with them. The guidelines were designed with that in mind. Holton, What is to be Done with Sentencing Guidelines?, LXI Florida Bar Journal 19 (Feb. 1987).

As the guidelines are revised from year to year, trial judges should be able to utilize the guidelines in effect on the day they sentence offenders. The alternative sought by the Petitioner would require judges to determine which one of various sets of guidelines was applicable on the date of the

commission of the offenses. This would render sentencing dispositions confusing and increasingly more burdensome. Its ultimate effect, clearly not intended by the legislature, would be to discourage modification of the guidelines because of the resultant administrative difficulties.

These administrative concerns are appropriately addressed in ex post facto analysis. Two federal circuit courts of appeal have so recognized in holding that application of the federal Bail Reform Act of 1984, which tightens the standard for granting bail pending appeal, is not ex post facto when applied to persons who committed crimes before the Act's effective date.

The Ninth Circuit, in United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985), stated:

> We conclude the change in the standard for bail pending appeal does not violate the ex post facto prohibition of the Constitution. Even if a retroactive change in the law is a disadvantage to the criminal defendant, it does not violate the ex post facto clause if the change is procedural rather than substantive. Dobbert [ ]. Though the distinction between substance and procedure in the context of the ex post facto clause may not be easy to discern in every case, it is an analytic form essential to the resolution of ex post facto cases. Dobbert, 432 U.S. at 292 [ ]. The dichotomy, we think, is an attempt to reconcile the necessity for continuous legislative refinements of the criminal adjudication and corrections process with the constitutional requirement that substantial rights of a criminal defendant remain static from the time

of the alleged criminal act. See Beazell v. Ohio, 269 U.S. 167, 170-71 [ ] (1925).

(Emphasis supplied).

Similarly, in United States v. Molt, 758 So.2d 1198, 1200 (7th Cir. 1985), the court commented:

> It would be odd to think that by committing a crime, a person acquired an indefeasible right to be tried for it in a particular way, or that in deciding whether to commit a crime the prospective criminal will have regard to the particulars of the procedures for the trial and appeal of criminal cases. And it would be odd and confusing to make courts use two sets of procedures at the same time in criminal cases, depending on the date when the crime was committed.

Therefore, it is the State's position that the Florida Supreme

Court correctly held that the use of the 1984 amended guidelines to sentence the Petitioner was not violative of the ex post facto clause.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Respondent, the State of Florida, respectfully requests that the decision of the Supreme Court of Florida be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, FL 32399-1050

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

APPENDIX A

The Florida Supreme Court's explanation of the 1984 amendments to the guidelines, reported at 451 So.2d 824.

The essential changes and reasons therefor are:

1) Redefine "primary offense" (3.701(d)(3)). The existing definition has been criticized because it allows manipulation among the guideline categories. Because the proposed redefinition selects the category with the most severe punishment, it is anticipated that manipulation will be avoided.

2) Revise 3.701(d)(5)(a) to result in greater precision when determining prior record. The date of commission of the "primary offense"

(defined at 3.701(d)(3)) will now be controlling.

3) Alter the time period for the calculation of juvenile prior record (3.701(d)(5)(c)). The existing provision makes juvenile record difficult to determine and hinges upon the date for the new conviction. The revision facilitates prior record determination by stopping the time period at the commission of the new offense. The revision includes a technical amendment to the Committee Note.

4) Redefine "victim injury" (3.701(d)(7)). This change makes clear that victim injury points are to be included when physical injury is an element of an offense at conviction.

5) Two revisions are made to 3.701(d)(11). The first change is technical in nature and better expresses the sentencing discretion of the court. The end of this paragraph has been revamped to replace the cumbersome language in the current rule. A change in the Committee Note is included to further express the intent of the Commission.

6) A new paragraph regarding violation of probation and community control is added to the rule (3.701(d)(14)).

7) Revisions have been made to the guidelines scoresheets (3.988(a)-(i)). Each form has been revised to permit scoring offenses and prior convictions in excess of four counts. Additionally, tables for first-degree

felonies punishable by life have been included in 3.988(a) and (e) for primary offense purposes. The prior record sections of each form have been revised to include tables for scoring first-degree felonies punishable by life.

8) Increase the primary offense points in Category 2, Sexual Offenses, of rule 3.988, form (b). The revision increases the primary offense points by 20% and will result in both increased rates and length of incarceration for sexual offenders. This revision represents a substantial departure from pre-guidelines practice, but is consistent with the urgings of many commentators.

9) The Committee Note to 3.701(d)(4) has been restricted in

scope to avoid confusion.

10) The Committee Note to 3.701(d)(8) has been amended to permit imposition of fines in accordance with prison sentences.

11) Language has been added to the Committee Note to 3.701(d)(11) which will require the sentencing court to disclose reasons for deviating from the guidelines at the time the sentence is imposed.

12) The Committee Note to 3.701(d)(11), which discusses statutory alternatives, has been completely eliminated. While these statutory alternatives are acknowledged, the sentencing court is required to explain the guideline departure when an alternative program is used.

13) The Committee Note to 3.701(d)(12) has been revamped. This language will permit the sentencing court to impose probation terms consecutive to prison sentences, limited in length only by general law.

REPLY BRIEF

No. 86-5344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

REPLY BRIEF FOR PETITIONER

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
CRAIG S. BARNARD
(Counsel of Record)
Chief Assistant Public Defender
ANTHONY CALVELLO
Assistant Public Defender
GARY CALDWELL
Assistant Public Defender
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150
Counsel For Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

THE RETROACTIVE APPLICATION TO MR. MILLER OF THE STATUTORY AMENDMENT TO THE FLORIDA SENTENCING GUIDELINES LAW TO INCREASE THE LENGTH OF INCARCERATION FOR SEXUAL OFFENSES, VIOLATES THE *EX POST FACTO* CLAUSE

The State has not disputed the two essential aspects of the reach of the *Ex Post Facto* Clause in this case: (1) that changes to the sentencing guidelines law were retrospectively applied to Mr. Miller; and (2) that those changes were disadvantageous to him by increasing his punishment, and indeed were intended to do so by the Florida Legislature.

Instead the State makes one argument: the sentencing guidelines are procedural and so changing them and retroactively applying those changes to a defendant's detriment cannot ever violate *ex post facto* proscriptions. The State, of course, takes this position in order to argue that the issue falls within the reasoning of *Dobbert* v. *Florida*, 432 U.S. 282 (1977). To come to that conclusion, the State submits two propositions. First, it argues that the Florida sentencing guidelines are discretionary because "departures" are allowed. Second, it proposes that since the Legislature told its guidelines commission to annually monitor the guidelines for amendments that might be required, the enabling legislation gave "fair notice" that there would be changes, thus rendering inapplicable any *ex post facto* concerns. For this latter argument, the State relies upon cases involving the federal parole guidelines.

The argument that the Florida guidelines law is discretionary and therefore may be retrospectively changed at will by the Legislature, has been adequately addressed in Mr. Miller's initial brief. The amendment to that law at issue here changed no procedures but rather changed only the point totals for the sentencing calculations with

the effect (and intent) of boosting Mr. Miller's prison sentence. Increasing the sentence beyond that permissible at the time of the offense is not a procedural change and is precisely the circumstance that the *Ex Post Facto* Clause is intended to preclude.

Florida's sentencing law is firm—a sentence outside the guidelines is unlawful, i.e. beyond the authority of the courts to impose. In a case where there are no "clear and convincing" reasons, based upon record facts proven beyond a reasonable doubt, and not already scored, the calculated guidelines sentence is the sentence that *must* be imposed. Any departure (upward or downward) from that sentence is "illegal" and will be reversed on appeal—"the absence of the statutorily mandated findings render[s] the sentences illegal because, in their absence, there [is] no statutory authority for the sentences." *State* v. *Whitfield*, 487 So.2d 1045, 1046 (Fla. 1986).[1]

Quite apparently, the sentencing law is not "discretionary." The only discretion in the statute is within the presumptive guidelines range provided by the sentencing law.[2] If a judge departs from that range, the review

[1] It is so fundamental a violation of Florida law that an improper departure will be reversed on appeal even if there was no objection. Departures from the guideline sentence are treated in the same manner as any other excessive or illegal sentence. *See State* v. *Whitfield*, *supra*; *cf. Williams* v. *State*, 500 So.2d 501, 502-503 (Fla. 1986) ("a defendant's acquiesence cannot confer jurisdiction on the court for such a departure," because "a defendant cannot . . . confer upon the court the authority to impose an illegal sentence").

[2] There is one other situation where it could be said that the judge retains discretion. It results from the fact that a sentence *within* the guideline sentence range is not reviewable on appeal. That is, a defendant has no right to require a downward departure, nor can the state force an upward departure from the guidelines sentence. So long as the judge imposes a sentence within the guidelines range, that decision is legal and unreviewable. Thus, even if the legal standards for a departure are met (i.e., clear and convincing reasons) the judge retains the discretion to impose a sentence within the guidelines range—for any or no reason. There is thus discretion to stay within the guidelines. Outside that range, discretion ends.

standard is not "abuse of discretion," but, significantly, the appellate court reviews the sentence to determine its legality under certain prescribed standards of proof and within limited criteria. There is no discretion in the sentencing law. The changes to that law resulting in an increased prison sentence for Mr. Miller cannot thus be termed "procedural" so as to avoid the *ex post facto* proscription.[3]

With that discretion argument answered, we move to the new argument put forth by respondent: the federal parole guidelines. As will be seen, the analogy is not apt. The Florida sentencing guidelines law shares only a common word with the federal parole "guidelines." In substance they are different in every respect relevant to *ex post facto* analysis.

The State's point of departure for its federal parole guidelines analogy is *Hayward* v. *U.S. Parole Commission*, 659 F.2d 857, 862 (8th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982). The State says it is "pleased" by Mr.

[3] *See also State* v. *Correll*, 148 Ariz. 468, 715 P.2d 721 (1986) (Citing *Weaver* v. *Graham*, 450 U.S. 24 (1981), the court held that retroactive application of one statutory aggravating circumstance which became effective after the offense violated the *Ex Post Facto* Clause); *Thompson* v. *Blackburn*, 776 F.2d 118, 121 (5th Cir. 1985) (Rejecting lower court's finding that a state statute which eliminated the possibility of parole, probation or suspension of sentence was "merely procedural").

Miller's citation to *Hayward*. RB 49.[4] It shouldn't be. That case is one of many explications of the fundamental *ex post facto* principle that the law in effect at the time of the *offense* is the established measuring point in assessing any *ex post facto* claim. *See also Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981). The State, unmoved by this fundamental *ex post facto* principle, urges a "compromise date" for when *ex post facto* attaches: the law on the date of sentencing.

Apparently aware of the constitutional precedent, the State alternatively suggests that "policy" considerations favor use of the "sentencing date." On the contrary, sentencing based on the date of the offense is more certain, efficient and fair. If the "sentencing date" controls guideline scoring, the sentencing procedure will be open to unfairness, capriciousness, and manipulation. The sentencing date can be inadvertently or intentionally delayed, postponed or accelerated to reach some desired result in the trial court. The sentencing date or future resentencing date is too elastic a concept to gauge a uniform system of sentencing guidelines.[5] If a revision or

[4] The citation symbol "RB" is used herein to refer to the Brief for Respondent.

[5] The extent to which that "sentencing date" reasoning can lead, is indicated by one case where amendments to the guidelines were retroactively applied on *appeal*. *Patterson* v. *State*, 486 So.2d 74 (Fla. 4th DCA 1986), *aff'd*, 499 So.2d 831 (Fla. 1987), *cert. pending*, No. 86-6360. In that case the sentence had been imposed under the law at the time of sentencing and was found illegal on appeal. On rehearing, however, the court noted that the guidelines law had changed so as to transform the sentence to a legal one. Thus, the court said that if the case were sent back for resentencing, the new law would be applied and the same sentence could be imposed. This was said to make the illegality "harmless" and so the sentence was upheld on appeal by retroactively applying an amendment to the guidelines law.

amendment is proposed and approved by the legislature, this will surely set in motion a wave of accelerations or postponements by the parties. Calculating the guidelines from the date of offenses brings the necessary uniformity and certainty which is the goal of the sentencing guidelines. Regardless, the "sentencing date" would apply only if there were no *Ex Post Facto* Clause in the Constitution. But there is, and its protection is implicated here.

The other arguments the State makes in its analogy to parole guideline cases fare no better. An examination of the federal parole guidelines and interpretative decisions reveals those guidelines do not come close to providing the strict limitation imposed by the Florida sentencing guidelines.

Federal parole was initially administered by the United States Board of Parole under a statutory charter granting it virtually unlimited and unreviewable discretion in parole decisions. In response to criticism of this system, the Parole Board in 1973 instituted parole guidelines to be followed in making all federal parole decisions. In 1976, Congress made the guideline system a legislative requirement.

In the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976), Congress created the United States Parole Commission (hereafter Parole Commission), an independent federal agency vested with power to grant and deny parole to any eligible federal prisoner, subject to certain limitations. The Parole Commission was directed to "promulgate rules and regulations establishing guidelines" with respect to the exercise of its own discretionary power to release federal prisoners on parole, 18 U.S.C. § 4203(a), and "such other rules and

regulations as are necessary to carry out a national parole policy."[6]

The Parole Commission is empowered to apply the guidelines in parole release decisions, 18 U.S.C. § 4203(b), and to grant or deny parole *in spite of* the guidelines "if it determines there is good cause for so doing," 18 U.S.C. § 4206(c). Pursuant to the authority vested in it by Congress, the Commission promulgated parole guidelines, 28 C.F.R. § 2.20(b), (c) (1983).[7] Thus, in *Inglese* v. *U.S. Parole Commission*, 768 F.2d 932 (7th Cir. 1985) the Court of Appeals concluded:

> The statute, the parole regulations, and the policy statements contained therein clearly and *repeatedly emphasize the discretionary aspect of the decision-making process of parole, particularly in the use of the guidelines*. While a heightened standard of review checks this discretion, the commission's inherent ability to exercise discretion is not thereby altered.

Id. at 936 (emphasis supplied). *See also Yamamoto* v. *U.S. Parole Commission*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Rifai* v. *Parole Commission*, 586 F.2d 695, 698 (9th Cir. 1978) (the Parole Commission guidelines were "merely procedural guideposts without the characteristics of laws"); *Ruip* v. *United States*, 555 F.2d 1331, 1335 (6th Cir. 1977).

Also as part of the statutory framework, the Parole Act contains provisions insulating Parole Commission decisions from judicial review. Section 4218(d) of the Act provides that the decision of the Parole Commission in granting, denying, conditioning, modifying, or revoking parole under section 4203(b)(1), (2), (3), are committed to the *discretion* of the Parole Commission and are *not reviewable* under 5 U.S.C. § 701(a)(2) (providing judicial review under the Administrative Procedure Act). Section 4218(d) thereby exempts all Parole Commission decisions relating to parole revocation from judicial review under the APA. *Luther* v. *Molina*, 627 F.2d 71, 75 (7th Cir. 1980). In *Wallace* v. *Christensen*, 802 F.2d 1539 (9th Cir. 1986) the court explained:

> By these provisions, Congress has specifically rebutted the presumption of reviewability of the Commission's substantive decisions to grant or deny parole, and, therefore, *these decisions may not be reviewed even for abuse of discretion*.

Id. at 1545 (emphasis supplied).

A number of federal prisoners have raised *ex post facto* challenges to more onerous federal parole guidelines pro-

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[6] The statutory criteria governing the Commission in its formulation of guidelines are prescribed by 18 U.S.C. § 4206(a):

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

[7] The statement of general policy preceding the guidelines also provides in pertinent part:

> (b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.
>
> (c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

mulgated after the offenses being used to determine their parole eligibility. As noted by the State, nine circuits and one Justice have concluded that retrospective application of the federal parole guidelines does not offend the *Ex Post Facto* Clause, although they have not always agreed on the rationale. The majority of these courts have held that the federal parole guidelines are not "laws" within the meaning of the *Ex Post Facto* Clause.[8] Courts have also found the guidelines merely rationalize the exercise of statutory discretion and that retrospective application of the guidelines thus does not violate *ex post facto* principles.[9] Some of these cases have held in the alternative that the retrospective application of the guidelines does not result in a more onerous punishment and thus does not violate the *Ex Post Facto* Clause.[10]

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[8] *See Inglese*, 768 F.2d at 935-36; *DiNapoli* v. *Northeast Regional Parole Commission*, 764 F.2d 143, 146 (2d Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 568 (1985); *Dufresne* v. *Baer*, 744 F.2d 1543, 1549-50 (11th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 61 (1985); *Roth* v. *United States Parole Commission*, 724 F.2d 836, 840 (9th Cir. 1984); *see also United States ex rel. Forman* v. *McCall*, 776 F.2d 1156, 1163 (3d Cir. 1985).

[9] *See Portley* v. *Grossman*, 444 U.S. 1311, 1312 (1980) (In Chambers opinion of Rehnquist, Circuit Justice); *Warren* v. *U.S. Parole Commission*, 659 F.2d 183, 195 (D.C. Cir. 1981). The Fifth Circuit merely held without further elaboration that "[t]here is no *ex post facto* violation in the retroactive application of the guidelines." *Stroud* v. *U.S. Parole Commission*, 668 F.2d 843, 847 (5th Cir. 1982).

[10] *See Dufresne*, 744 F.2d at 1549-50; *Warren*, 659 F.2d at 193; *Rifai* v. *United States Parole Commission*, 586 F.2d at 698-99. These cases were decided on the basis that it is "axiomatic that for a law to be *Ex Post Facto* it must be more onerous than the present law." *Dobbert*, 432 U.S. at 294.

The Court has twice expressly declined to consider whether retrospective application of the federal parole guidelines violates the *Ex Post Facto* Clause. *See United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 390 n.1 (1980); *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979). In each of those cases, the Court found it unnecessary to address any part of the *ex post facto* issue.

A comparison of the federal parole guidelines and the Florida sentencing guidelines law underscores the vast distinction between the two mechanisms. The federal parole guidelines are merely agency-promulgated guides to assist the Parole Commission in formulating appropriate parole release dates. A majority of the courts have held that the *Ex Post Facto* Clause does not apply to the federal parole guidelines because the agency regulations are not "law." In contrast, the Florida sentencing guidelines and the instant statutory amendment to the sentencing guidelines are clearly laws within the meaning of the *Ex Post Facto* Clause. Rather than guidelines formulated by the Parole Commission to guide its own discretionary acts, the Florida sentencing guidelines are promulgated by the legislative branch as substantive restraints upon the judicial branch. Amendments to the guidelines law are effective only upon becoming *law*—even if the Florida court has approved them. The failure to adhere to the guidelines is "illegal," because there is "no statutory authority" for the courts to impose a sentence contrary to that prescribed by the law. *See State* v. *Whitfield*, *supra*.

The Parole Commission has inherent ability to exercise its discretion in the decision-making process of parole and in the use of the federal parole guidelines. The federal parole guidelines are "merely guides." *See Inglese*, 768 F.2d at 936. The Parole Commission may follow its parole guidelines, disregard them, or change them. Parole remains an act of discretion. *See Dufresne*, 744 F.2d at 1550. Even the Parole Commission's decisions on parole

revocation are insulated from judicial review under the APA. *See Wallace* v. *Christensen, supra.*[11]

The nature of parole itself distinguishes it from the Florida sentencing system. "[P]arole is not part of a criminal prosecution." *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972). "Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . [and] [s]upervision is not directly by the court but by an administrative agency." *Id.* "Its purpose is to help individuals reintegrate into society. . . . The essence of parole is release from prison, before completion of sentence." *Id.* at 477. Of course, what is involved in this case is the initial imposition of the sentence by the court, quite plainly a part of the criminal prosecution.

In stark contrast to federal parole, the Florida sentencing guidelines law while allowing some discretion *within* each calculated guideline range, establishes a *presumption* that the recommended sentence contained therein be employed. Rule 3.701(d)(8), (d)(11). Any variance from the calculated sentence is to be avoided and is illegal unless the judge finds clear and convincing reasons to justify a departure and puts those reasons in writing so as to permit appellate review. Rule 3.701(d)(11). The facts supporting these "clear and convincing reasons" must be "credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." *State* v. *Mischler*, 488 So.2d 523 (Fla. 1986). *Accord Scurry* v. *State*,

[11] Likewise the state parole guidelines (Florida's included) are totally discretionary agency guides. *See Johnson* v. *Wainwright*, 772 F.2d 8[illegible]3 (11th Cir. 1985); *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 147 (1984).

489 So.2d 25, 28 (Fla. 1986). The Florida Supreme Court has indicated that while Rule 3.701(d)(11) "does not eliminate judicial discretion in sentencing, as respondent argues, it does seek to discourage departure from the guidelines." *Hendrix* v. *State*, 475 So.2d 1218, 1220 (Fla. 1985). These requirements place a heavy burden on the party advocating a departure both from a persuasive and evidentiary standpoint. And most importantly, under § 921.001(5), *Fla. Stat.* (1984), any departure from the presumptive guidelines sentence range is reviewable on appeal. As the cases cited above and those in Appendix B demonstrate, that review is a serious right that has resulted in very strict enforcement of the guidelines law.

The Florida sentencing guidelines represent a clear break with the former indeterminate sentencing system in Florida which formerly vested the trial judge with virtually unlimited discretion to impose any sentence within the maximum and minimum sentence set by the Legislature. Contrary to what the State suggests, state law interpreting the Florida sentencing guidelines explicitly channel and limit the trial judge's discretion in sentencing. The State's failure to acknowledge (or address) that fact is, in part, the flaw in its position. Its analogy to the federal parole guidelines would be sounder if the federal parole guidelines were laws or the Florida sentencing guidelines merely provided the sentencing judge with a presumptive sentence from which he could deviate at his complete discretion. However, Florida law demonstrates otherwise. The requirement of clear and convincing reasons, the reasonable doubt standard, and appellate review and enforcement make the right to be sentenced within the guidelines range a substantive right—at a far pole from parole guidelines containing none of these provisions.

The State argues that even if the retroactive application of this statutory amendment to the sentencing guidelines is not "procedural" there would still be no violation of the *Ex Post Facto* Clause because Mr. Miller had "fair notice" of possible amendments to the sentencing guidelines. It points to the fact that the sentencing guidelines under Section 921.001(3), *Fla. Stat.* (1983) provide that: "Following the initial development of statewide sentencing guidelines by the Court, the Commission shall . . . review sentencing practices and recommend modification of the guidelines." Citing *Weaver*, the State states that the purpose of the *Ex Post Facto* Clause is to insure "fair warning." It follows according to the State that like all offenders, Mr. Miller, whose offense occurred after the effective date of the sentencing guidelines (October 1, 1983) "was on notice that the guidelines would be used in calculating his recommended sentence, they were subject to amendment and the recommended range could be exceeded up to the statutory maximum penalties for the crimes he committed, which remained unchanged." RB 39. Thus, in the State's view Mr. Miller "had that fair warning." RB 40. Mr. Miller disagrees.

Contrary to the State's suggestion, fair warning is not the sole focus of *ex post facto* analysis. When subjecting a law to *ex post facto* scrutiny, courts should bear in mind the related aim of the *Ex Post Facto* Clause of preventing vindictive criminal legislation. *Weaver*, 450 U.S. at 28-29.[12] "From the outset . . . the *ex post facto* clauses have been understood to have been principally aimed at

[12] "The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at 29. This aim is also implicated at bar.

curtailing legislative abuses." *Warren* v. *U.S. Parole Commission*, 659 F.2d 183, 187 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 650 (1982). This aim of the *Ex Post Facto* Clause is implicated here because one of the principle purposes of the instant statutory amendment was to "increase[] rates and lengths of incarceration for sexual offenders." *The Florida Bar: Amendment to Rules of Criminal Procedure*, 451 So.2d 824 (Fla. 1984).

The fair warning aim of the *Ex Post Facto* Clause was likewise violated by the retroactive application of this statutory amendment. The *Weaver* Court expressly stated that the Clause assures that penal statutes "give fair warning of their effect and permit individuals to rely on their meaning until *explicitly changed*." *Id.* at 28-29 (emphasis supplied). In *Dobbert*, the Court explained "the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first degree murder." *Id.* at 298.[13] These cases indicate that fair warning in the *ex post facto* context must be equated with a statutory pronouncement on the subject matter not to a statutory provision that *merely allows future changes*. The State's argument suggests that the Legislature may avoid the constitutional prohibition against *ex post facto* laws merely by adding to the statute or rule that it is subject to revision. *All* laws are subject to revision and modification, and merely because one is put on notice of this obvious fact does not destroy a person's expectation of

[13] In *Kring* v. *Missouri*, 107 U.S. 221 (1883), the Court endorsed this "excellent observation": "'No one can be criminally punished in this country, *except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time.*'" *Id.* at 230-231 (quoting *Hartung* v. *People*, 22 N.Y. 95, 104 (1860)) (emphasis in original).

having his or her conduct viewed under the law existing at the time of the offense.

In *Rodriguez* v. *U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979), cited with approval in *Weaver*, the Circuit Court held that the *Ex Post Facto* Clause was violated by the retroactive application of a Parole Commission administrative regulation not in effect at the time of his offense that denied a prisoner any meaningful consideration for parole. The Parole Commission, citing *Dobbert*, 432 U.S. at 297-98, argued that the Parole Commission and Reorganization Act and the agency's own notice of the proposed elimination of the one-third hearing are "operative facts," which gave Rodriguez notice that he would not be entitled to such a hearing. The court rejected this argument because the Parole Act "itself does not require the elimination of the one-third hearing, and therefore it gave no notice of the elimination of the hearing." *Id.* at 176. And more importantly

> the *ex post facto* clause looks to the punishment annexed at the time the crime was committed. *E.g.*, *Dobbert* v. *Florida*, *supra*, 432 U.S. at 292. . . . Consequently, the "operative facts" relied on by the commission, which did not come into existence until after the offense was committed, cannot satisfy the requirements of the *ex post facto* clause.

Id. at 176.[14] Likewise at bar, the statutory amendment, which became effective after the offense was committed, cannot satisfy the requirements of the *Ex Post Facto* Clause.

The State's next argument to justify retroactive application of the stiffer guidelines amendment is a sug-

[14] The court also rejected the Parole Commission's contention that the change was merely "procedural" and therefore not within the scope of the *ex post facto* clause.

gestion that retroactive application would not have affected the actual sentence imposed upon Mr. Miller. It reasons that the trial judge may have "departed" pursuant to Rule 3.701(d)(11) from Mr. Miller's presumptive guidelines sentence and then sentenced Mr. Miller to the identical seven years in prison. RB 37. First, this argument only supports Mr. Miller's position that retroactive application of the amendment to the guidelines was more onerous and detrimental to Mr. Miller. Second, the State ignores the admonition in *Weaver*, that it is irrelevant that the same result might have been possible under another provision.

In assessing whether a provision is *disadvantageous*, courts must look to the challenged provision itself and ignore any extrinsic circumstances that may mitigate its effect on the particular individual. *Weaver*, 450 U.S. at 33; *Dobbert*, 432 U.S. at 300. *Ex post facto* analysis "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." *Weaver*, 450 U.S. at 30 n.13.[15] Thus *Weaver* refutes the State's argu-

[15] This also answers the State's suggestion that *all* of the statutory amendments to the guidelines contained in Laws of Fla., Ch. 84-328, should be examined *in toto* to assess its impact on Mr. Miller. RB 63-64. The State has failed to identify even *one* statutory amendment that could possibly ameliorate or benefit Mr. Miller. In addition to the statutory amendment which added points to Mr. Miller's "primary offense" in the instant case, JA 16-17, *see also Beggs* v. *State*, 473 So.2d 9 (Fla. 1st DCA 1985), *rev'd*, 487 So.2d 1070 (Fla. 1986); *Moore* v. *State*, 469 So.2d 947 (Fla. 5th DCA 1985), *rev'd*, 489 So.2d 1130 (Fla. 1986), four other simultaneous statutory amendments were held to be detrimental or more onerous *prior* to the decision in *State* v. *Jackson*, 478 So.2d 1054 (Fla. 1985). *See Ennis* v. *State*, 475 So.2d 713 (Fla. 1st DCA 1985) (redefine primary offense); *Mott* v. *State*, 469 So.2d 946 (Fla. 5th DCA 1985), *rev'd*, 488 So.2d 535 (Fla. 1986) (allow

ment. In any event such argument is pure speculation. There is absolutely no indication that the trial judge wanted to depart from Mr. Miller's presumptive guidelines sentence range. JA 7-10. In fact, the trial judge specifically rejected the State's motion to aggravate or depart from the presumptive guidelines sentence. JA 8-10.

Another argument advanced by the State is that the Florida sentencing guidelines in general are ameliorative. RB 23, 38. However, as discussed in Mr. Miller's intial brief (pgs. 13), the Florida sentencing guidelines were mandatory as to Mr. Miller and thus whatever force an argument that the Florida sentencing guidelines are ameliorative vis-a-vis the prior indeterminate sentencing scheme might have, such argument is totally irrelevant to the issue at bar.[16]

In sum the State fails to properly apply the Court's two prong test established in *Weaver* to assess an *ex post facto* violation: (1) is the law retrospective, that is, does the law attach legal consequences to crimes committed before the

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the trial judge to score more than four prior felonies); *Patterson* v. *State*, 486 So.2d 74 (Fla. 4th DCA 1986), *aff'd*, 499 So.2d 831 (Fla. 1987) (total sanction incarceration and probation shall not exceed statutory maximum as opposed to maximum guideline range); *Hopper* v. *State*, 465 So.2d 1269 (Fla.2d DCA), *rev. denied*, 475 So.2d 696 (Fla. 1985) (revised guidelines assesses separate points for first degree felony punishable by life).

[16] For its general policy argument the State notes that Minnesota has a sentencing guidelines system similar to Florida and it too has amended them. RB 26. The State failed, however, to examine how Minnesota has administered its guidelines. Unlike in Florida, amendments to the Minnesota guidelines have not been retroactively applied. *See State* v. *Willis*, 364 N.W.2d 498, 500 (Minn. Ct.App. 1985).

law took effect, and (2) does the law affect a person who committed those crimes in a disadvantageous fashion? If the answer to both questions is yes, then the law constitutes an *ex post facto* law and is void as applied to those persons. The answers are "yes" in this case and the State has not said otherwise. There is no issue in this case as to whether the penal law is retrospective. The State concedes it. RB 4, 14. There is no real issue in this case as to whether the amendment affected Mr. Miller in a disadvantageous fashion. The State agrees that it resulted in an increase in the presumptive guidelines sentence range for Mr. Miller.

In *Weaver*, the Court looked no further than the statute. It need not go further in this case. The *Ex Post Facto* Clause has been violated.

CONCLUSION

Mr. Miller is entitled to be sentenced under the Florida sentencing guidelines in effect on the date of his offense. The contrary judgment of the Supreme Court of Florida must be vacated.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
CRAIG S. BARNARD
(Counsel of Record)
Chief Assistant Public Defender
ANTHONY CALVELLO
Assistant Public Defender
GARY CALDWELL
Assistant Public Defender
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150
Counsel For Petitioner

AMICUS CURIAE

BRIEF

No. 86-5344

In The
Supreme Court of the United States
October Term, 1986

James Ernest Miller,
Petitioner,

-V.-

State of Florida,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

Brief AMICI CURIAE of the American Civil Liberties Union and the ACLU of Florida

Alvin Bronstein
David B. Goldstein
Counsel for ACLU
335 W. 43rd Street
New York, New York
10036
(212) 944-9800

Michelle Ivy
Counsel for ACLU
of Florida
225 N.E. 34th Street
Miami, Florida
33054
(305) 576-2336

Gerald D. Stern
(Counsel of Record)
Steven E. Landers
Ann J. Holtwick
Philip R. White
Paul, Weiss, Rifkind
Wharton & Garrison
1285 Avenue of the
Americas
New York, New York
10019
(212) 373-3000

No. 86-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES ERNEST MILLER,

Petitioner,

-v.-

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, ON BEHALF OF PETITIONER

The American Civil Liberties Union ("ACLU") and the American

Civil Liberties Union of Florida respectfully move for leave to file the within brief amici curiae. The petitioner has consented to the filing of this brief; the respondent has not.

The ACLU is a nationwide, nonpartisan organization of more than 250,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Florida is one of its state affiliates.

The ACLU and its affiliates have long worked to defend basic constitutional rights of all persons, including the rights of those accused and convicted of crimes. In so doing, the ACLU has, in recent years,

filed briefs as counsel for a party or as amicus curiae in many cases involving the constitutional rights of those accused and convicted of crimes. Accordingly, we move to file this brief amici curiae to bring that experience to bear on the important questions presented by this case.

Respectfully submitted,

Gerald D. Stern

GERALD D. STERN
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

January 13, 1987

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QUESTION PRESENTED

Whether retroactive application of Florida's amended sentencing guidelines, which had the effect of increasing petitioner's sentence from four and one-half years to seven years, is a violation of the Ex Post Facto Clause of the Constitution.

INTEREST OF THE AMICI CURIAE

The interest of the amici curiae, the American Civil Liberties Union and ACLU of Florida, is fully set forth in the attached Motion for Leave to File Brief of Amici Curiae.

STATEMENT OF THE CASE[1/]

On April 25, 1984, James Ernest Miller was charged with sexual battery in Broward County, Florida. Mr. Miller was convicted of sexual battery on August 30, 1984, and, on October 2, 1984, he was sentenced in accordance with the existing Florida sentencing guidelines to seven years in prison. (Pet. at 2)

1/ The amici curiae adopt the Statement of the Case set forth in Petitioner's Brief. The Statement of the Case set forth here is meant only to highlight the important facts relevant to the question presented in this case. The facts are drawn from Mr. Miller's Petition for Certiorari (hereinafter "Pet. at ___").

Sentencing Guidelines (the "Original Guidelines") first went into effect in Florida on October 1, 1983. In June 1984, the Florida Legislature approved amendments to the Original Guidelines (the "Amended Guidelines") which went into effect on July 1, 1984. Thus, between the time of Mr. Miller's crime and the time he was sentenced, Florida's Original Guidelines had been changed, and Mr. Miller was sentenced under the new Amended Guidelines, rather than under the Original Guidelines. (Pet. at 3)

This switch from the Original Guidelines to the Amended Guidelines had a substantial impact on the sentence received by Mr. Miller. Under Florida's

guidelines system,[2/] points are assigned to various characteristics of the crime and the offender. See Fla. R. Crim P. 3.988. These characteristics include the severity of the crime, injury to the victim and the prior record of the offender. Id. Point totals correspond to a

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2/ Florida is just one of a number of states which have adopted a system of sentencing guidelines. For a discussion of sentencing guidelines schemes used in other states and the trend toward determinate sentencing generally see Crump, Determinate Sentencing: The Promises and Perils of Sentencing Guidelines, 68 Ky. L.J. 1 (1979); von Hirsch, Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission, 5 Hamline L. Rev. 164 (1982).

predetermined narrow range of sentences. Id.

This precisely determined presumptive sentence is the sentence an offender normally can expect to receive upon conviction. The sentencing court's discretion to impose a sentence outside the narrow range set forth in the guidelines is very limited. Florida's Rules of Criminal Procedure explicitly provide that "[d]epartures from the guideline range should be avoided . . ." Fla. R. Crim. P. 3.701(d)(11). Enhancement or mitigation of the presumptive sentence must be accompanied by written reasons. Id. These reasons must be clear and convincing and based upon facts proved beyond a reasonable doubt at trial. Id. All

sentences below or above the range set forth in the guidelines are then subject to appellate review, and will be revised if clear and convincing reasons for departing from the guidelines do not appear on the record. Fla. Stat. Ann. § 921.001(5) (West 1985); see also Mitchell v. State, 458 So. 2d 10 (Fla. Dist. Ct. App. 1984).

A Florida court's discretion to sentence outside the guidelines is extremely circumscribed. For example, a sentence differing from the presumptive sentence cannot be justified by factors already

incorporated into the guidelines.[3] Id. As the Supreme Court of Florida has recognized, the very purpose of the system is to discourage judges from imposing sentences inconsistent with the guidelines. Hendrix v. State, 475 So. 2d 1218, 1220 (Fla. 1985).

The Amended Guidelines at issue in this case increased the points assigned for sexual offenses in the Original Guidelines by more than twenty percent.[4] Since the number of points closely corresponds to a predetermined sentencing range, the base sentence for sexual offenses was effectively increased. Thus, despite the fact that at the time

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3/ Thus, for example, a judge cannot justify a sentence outside the guidelines range on the basis that defendant used a gun to commit the crime. See Bowdoin v. State, 464 So.2d 596 (Fla. Dist. Ct. App. 1985). The Florida courts have also rejected several other reasons for enhancing or mitigating the presumptive sentence. See State v. Bentley, 475 So. 2d 255 (Fla. Dist. Ct. App. 1985) (pregnancy); State v. Caride, 473 So. 2d 1362 (Fla. Dist. Ct. App. 1985) (prison overcrowding); Thomas v. State, 461 So .2d 234 (Fla. Dist. Ct. App. 1984) (defendant's alleged belief that he could make a better living by stealing). See also Fla. R. Crim. P. 3.701(d)(11).

4/ Compare In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So. 2d 848 (Fla. 1983) (assigning 132 points to second degree sexual offenses) with The Florida Bar: Amendment to Rules of Criminal Procedure (Sentencing Guidelines), 451 So. 2d 824 (Fla. 1984) (assigning 158 points to second degree sexual offenses).

Mr. Miller committed his offense, a defendant convicted of sexual battery would, under the Original Guidelines, receive a maximum sentence of four and one-half years, Mr. Miller, under the Amended Guidelines, received a sentence of seven years.[5/] As a

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5/ Under the Original Guidelines, Mr. Miller's sentence would have been determined as follows: 132 points for the primary base offense (sexual battery in the second degree), 49 points for secondary offenses included in the indictment, 10 points for his prior record, and 40 points for the degree of the victim's injury, yielding a total of 229 points and a presumptive sentence of three and one-half to four and one-half years. Under the Amended Guidelines, the points assigned for the secondary offenses, and the prior record and victim injury, remain the same, but an additional 8 points are assigned for Mr.

(Continued)

result of a mere coincidence in the timing of the effective date of the Amended Guidelines and Mr. Miller's sentences, he unexpectedly received a sentence that was nearly double that he would have received under the Original Guidelines, which were in effect at the crime was committed.

On appeal, the Florida Court of Appeal vacated Mr. Miller's sentence, because the use of the Amended Guidelines in sentencing Mr. Miller violated the Ex Post Facto Clause of Article I, Section 10, of

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(Continued)
Miller's primary offense, increasing his point total to 257. The additional points increased the presumptive sentence to five and one-half to seven years.

the Constitution by increasing the sentence for a crime after it had been committed. Miller v. Florida, 468 So. 2d 1018 (Fla. Dist. Ct. App. 1985).

The Florida Supreme Court reversed, holding that the changes embodied in the Amended Guidelines were merely "procedural" and did not substantively alter the punishment Mr. Miller could expect to receive. State v. Miller, 488 So. 2d 820 (Fla. 1986).

SUMMARY OF ARGUMENT

The use of the Amended Guidelines to determine Mr. Miller's sentence is a plain violation of the Constitution's ban on ex post facto laws. The meaning of the Ex Post Facto Clause of the Constitution is simple and straightforward: the punishment for a crime cannot be increased after the crime has been committed.

There can be no doubt that the amendment of the Original Guidelines substantively changed the sentence received by Mr. Miller. By assigning point values to the various characteristics of a crime, Florida's sentencing guidelines fix a narrow range within which it is permissible to sentence a particular offender.

Further, Florida law severely restricts the discretion of the judge to impose punishment other than that prescribed by the guidelines. The sentence as determined by the guidelines is the sentence an offender can normally expect to receive. Hence, changes in the point values associated with the crime, such as those embodied in the Amended Guidelines, change punishment.

Further, the fact that Mr. Miller was sentenced under the Amended Guidelines, rather than the Original Guidelines, plainly worked to his detriment, since it resulted in a longer sentence, and the Amended Guidelines were intended to achieve precisely that result.

Finally, it is indisputable that the Amended Guidelines, as applied by the Florida Courts, are retrospective. The Florida Supreme Court has expressly held that the Amended Guidelines apply to crimes committed prior to their effective date.

In sum, in their operation and effect, the Amended Guidelines are precisely the type of "arbitrary and potentially vindictive legislation" the Ex Post Facto Clause prohibits. Weaver v. Graham, 450 U.S. 24, 29 (1981). The decision of the Florida Supreme Court must therefore be reversed and Mr. Miller's sentence must be vacated.

ARGUMENT

THE USE OF AMENDED GUIDELINES TO SENTENCE AN OFFENDER FOR CRIMES COMMITTED PRIOR TO THEIR ENACTMENT VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION

Since the earliest days of the Republic, it has been settled that "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed," violates the Constitutional prohibition of ex post facto laws. Calder v. Bull, 2 U.S. 385, 390 (1790); accord, In re Medley, 134 U.S. 160, 171 (1890). In order to run afoul of the prohibition of ex post facto laws, the law must affect a substantial right, see Weaver v. Graham, 450 U.S. 24, 29-32 (1981), rather than merely alter

"'modes of procedure which do not affect matters of substance.'" Dobbert v. Florida, 432 U.S. 282, 293 (1977) (quoting Beazell v. Ohio, 269 U.S. 167, 171 (1925)). Further, "two critical elements must be present for a criminal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender by it." Weaver, 450 U.S. at 29; see Dobbert, 432 U.S. at 294 ("[i]t is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."). Application of the Amended Guidelines, which were enacted expressly to lengthen the prison terms of sexual offenders, to defendants -- like Mr. Miller -- who committed

their crimes prior to the enactment of the Amended Guidelines manifestly violates the bar on ex post facto laws.

A. The Amended Guidelines Substantively Change the Punishment an Offender Can Expect To Receive

In ruling that sentencing Mr. Miller under the Amended Guidelines was constitutionally permissible, the Florida Supreme Court held that changing the number of points assigned to a criminal act by amending the sentencing guidelines is merely a "procedural" change not subject to the ex post facto prohibition. State v. Miller, 488 So. 2d 820 (Fla. 1986) (expressly relying on State v. Jackson, 478 So. 2d 1054, 1056 (Fla. 1985)). Nothing could be

further from the truth. Since the Amended Guidelines effectively increase the "quantum of punishment," they are, and must be treated as, affecting matters of substance. Dobbert, 432 U.S. at 294 (1977).[6/]

What qualifies as a "procedural rule" is strictly limited. As this Court has stated, the "procedure" exception to the ex post facto prohibition applies only where

> [t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remain

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6/ The determination of whether a change in law falls within the "procedure" exception to the ex post facto doctrine is a matter of federal law. See Dobbert, 432 U.S. at 292-294; Beazell v. Ohio, 269 U.S. 163 (1925).

> unaffected by the subsequent statute.

Dobbert, 432 U.S. at 294 (quoting Hopt v. Utah, 110 U.S. 574, 589-90 (1884)). None of these criteria apply here, for a cursory examination of Florida's sentencing guidelines system shows that the guidelines are the basis upon which criminal sanctions are imposed in Florida.

The operation of Florida's guideline system demonstrates that the guidelines are meant to fix a precise and narrow range of punishment for a given offender. The guidelines do not guide discretion. Rather, they operate much like a computer. The court inputs various data about the offender and the crime and the sentence, within narrowly

fixed limits, is mechanically determined. Moreover, the rules adopted in conjunction with the Original Guidelines and the practice in the Florida courts make clear that the court's authority to sentence outside the guidelines is meant to be extremely limited. See Fla. R. Crim. P. 3.701(d)(11) ("departures from the guideline range should be avoided."), and pp. 2-3, supra.

The State of Florida has explicitly recognized that the guidelines affect substantial rights. In creating the Sentencing Commission, which initially developed the Original Guidelines, the Florida Legislature recognized that developing sentencing criteria was primarily a matter of substantive law.

> The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature.

Fla. Stat. Ann. § 921.001 (West 1985) (emphasis added). The substantive effect of the Amended Guidelines was also recognized by the Florida Supreme Court when the Original Guidelines were amended in 1984.

> The essential changes and reasons therefor are . . . to increase the primary offense points in category 2 sexual offenses . . . the revision increases the primary offense points by 20% and will result in both an increased rate and length of incarceration for sexual offenders. . . .

In re Amendments to Rules of Criminal Procedure, 451 So. 2d 824 (1984) (emphasis added).

Because sentencing guidelines determine the quantum of punishment an offender will receive, changes in the guidelines, such as those embodied in the Amended Guidelines, substantively change punishment. For this reason, the changes embodied in the Amended Guidelines are unlike any that have been construed by this Court as merely "procedural."

In Dobbert, for example, the Court considered whether a change in the allocation of authority, between judge and jury, for the imposition of a death sentence, violated the Ex Post Facto Clause when applied retroactively. Finding that the change did not add to the "quantum of punishment," the Court

held there was no ex post facto violation. 432 U.S. at 293-94; see also Beazell v. Ohio, 269 U.S. 163 (1925) (change in rules for severance of trials); Malloy v. South Carolina, 237 U.S. 180 (1915) (change in method of execution of death sentence); Mallet v. North Carolina, 181 U.S. 589 (1901) (change in rules governing appeals by the state); Gibson v. Mississippi, 162 U.S. 565 (1896) (change in method of selection of jury venire); Duncan v. Missouri, 152 U.S. 377 (1894) (change in structure of the courts).

None of the changes discussed in the above cases determined the length of sentence to be imposed upon a criminal defendant, as do the Amended Guidelines. Thus, the

Florida Supreme Court erred in finding the guidelines to be merely procedural.

B. The Operation of the Amended Guidelines Works to Mr. Miller's Detriment

The use of the Amended Guidelines substantively affected the sentence that Mr. Miller received, to his indisputable detriment. Rather than receiving a sentence of four and one-half years, Mr. Miller is now serving a seven-year sentence. If the effect of the change in the sentencing law is to lengthen the period that the defendant is incarcerated or otherwise in the state's custody -- as it plainly is here -- the law is detrimental within the meaning of the Constitution's

prohibition of ex post facto laws. See Weaver, 450 U.S. 24 (reduction in the availability of automatic gain-time); Lindsey v. Washington, 301 U.S. 397 (1937) (abolition of minimum sentencing).

In short, since Mr. Miller's sentence as determined by the Amended Guidelines -- and hence the sentence he received -- is nearly double the sentence that would have been imposed under the Original Guidelines, the Amended Guidelines indisputably operate to his detriment.

Nor is it significant to the issue presented here that the Amended Guidelines do not change the statutory maximum penalty for second degree felonies which remains fifteen

years. Fla. Stat. Ann. § 775.082(c) (West 1985). In Lindsey, the Court held that retroactive application of a new sentencing scheme detrimentally affected an offender, even though the new scheme left unchanged the maximum statutory penalty.

In Lindsey, when the petitioner committed his crime, the State of Washington used a system of indeterminate sentencing. 302 U.S. at 398. The maximum penalty for the crime was 15 years, and the minimum could range between 6 months and 5 years, in the discretion of the court. Id. The defendant would be eligible for parole after serving the minimum. Id. By the time of the petitioner's sentencing, indeterminate sentences had been abolished.

Id. Although the maximum punishment was left unchanged, the court no longer had discretion to sentence an offender to less than the maximum prison term. Id. The actual length of incarceration was to be set later by the parole board. Id. at 399.

In holding that retroactive application of the new sentencing law violated the ex post facto prohibition, the Court expressly rejected the argument that since no change in the maximum statutory penalty had been enacted, there was no detriment to the petitioner. Id. at 400. The Court noted "that an increase in the possible penalty is ex post facto -- regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by

the later statute is more severe than that of the earlier." Id. at 401.

So it is here. Like the change in Lindsey, Florida's Amended Guidelines prescribe a "more severe" "measure of punishment" than the Original Guidelines. For this reason, the Amended Guidelines materially "alter[] the situation of the accused to his disadvantage." In re Medley, 134 U.S. 160, 171 (1890); accord, Weaver, 450 U.S. at 32. Thus, the Amended Guidelines cannot constitutionally be applied retroactively.

C. The Guidelines Are Retrospective

The best evidence that the Amended Guidelines are retrospective

is that they have been applied to Mr. Miller, and others, retroactively. This is in accord with State v. Jackson, 478 So. 2d 1054 (Fla. 1985), in which the Supreme Court of Florida held that a trial court may properly sentence a defendant according to the guidelines in effect at the time of sentencing -- regardless of when the crime was committed. It cannot be seriously maintained that such a law is anything other than retrospective.

CONCLUSION

As the foregoing discussion amply demonstrates, Florida's Amended Guidelines increase the punishment for sex offenders. Thus, the Amended Guidelines cannot constitutionally be retroactively applied, as they were in this case. For these reasons, the decision of the Florida Supreme Court should be reversed and the case remanded for resentencing in

accordance with the guidelines in effect when Mr. Miller committed his crime.

Dated: January 13, 1987

Respectfully submitted,

GERALD D. STERN
(Counsel of Record)
Steven E. Landers
Ann J. Holtwick
Philip R. White
Paul, Weiss, Rifkind
Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Alvin Bronstein
David Goldstein
American Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Michelle Ivy
American Civil Liberties
Union of Florida
225 Northeast 34th Street
Suite 208
Miami, Florida 33137
(305) 576-2336

Counsel for Amici Curiae